SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1902.

MELVIN A. HOYT,
Plaintiff in Error

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

Error to the Supreme Court of the State of Wisconsin.

BRIEF FOR PLAINTIFF IN ERROR.

In April, 1900, at the city of Milwaukee, the plaintiff in error Hoyt was engaged in the publication of a daily newspaper called the Milwaukee Daily News. At the same city plaintiff in error in number 297, Aikens was then engaged in the publication of a daily paper known as the Evening Wisconsin; and plaintiff in error in number 298, Huegin at the same city then was engaged in publishing another daily paper known as The Milwaukee Sentinel; contemporaneously with such publications there was published in Milwaukee still another daily paper known as the Milwaukee Journal.

These several publications continuing, on the 21st day of October, 1901, the district attorney of Milwaukee county filed in the Municipal Court of that county, being a court of criminal juris-

diction, an information the equivalent of a criminal indictment under the laws of Wisconsin, against Hoyt, Aikens and Huegin jointly, as such publishers, alleging a conspiracy between them to injure the business of the Journal Company, publisher of the Milwaukee Journal, and as well to the injury of its officers and stockholders. (Transcript 10.)

The filing of the information was followed by the issuance of a warrant for the arrest of Hoyt, Aikens and Huegin by virtue of which they were severally arrested and brought before the court on October 21, 1901. (Transcript 9.)

On that day plaintiff in error Hoyt filed his demurrer to the information as not stating a criminal offense and as violative of the provisions of article XIV of the amendments to the Constitution of the United States. (Transcript 14.) Afterward on November 20, 1901, the issue joined by such demurrer came on for hearing and argument and was then argued by counsel for the State and for Hoyt, when the demurrer was overruled, to which order and ruling plaintiff in error then and there duly excepted, which exceptions were reduced to writing and allowed by the court.

Plaintiff in error thereupon signified to the court that he stood upon his demurrer and did not desire to plead over. Upon such intimation of the accused, the court proceeded to find him guilty as charged and sentenced and adjudged that he pay a fine of $150, together with $67.10 costs of the proceedings, and that in default of such payment he be committed to the House of Correction for Milwaukee County until such fine and costs were paid, not, however, in all exceeding thirty days. (Transcript 16.) Thereupon the plaintiff in error tendered his

exceptions to the findings and judgment of conviction, which exceptions were reduced to writing and allowed by the court. (Transcript 16.)

Thereupon a stay of proceedings upon this judgment was granted upon the execution of a bond for that purpose in the sum of $500, which bond was executed and approved on that day; the stay to continue until the remittitur in the cause should be returned from the Supreme Court of the State. (Transcript 26.)

On November 25, 1901, a writ of error on the application of Hoyt was duly issued by the Supreme Court of Wisconsin to the Municipal Court of Milwaukee County, returnable on the Tuesday before the second Wednesday of January, 1902, and served the next day, whereby the judgment and record in this cause were removed to the Supreme Court of Wisconsin to be reviewed in that court. (Transcript 24.) Accordingly on December 4, 1901, the clerk of the Municipal Court made return in writing of a certified copy of the record and judgment in this cause to the Supreme Court of Wisconsin in conformity with law and the rules of that court.

Afterward, the cause having been duly submitted, on the 18th day of February, 1902, the Supreme Court of Wisconsin rendered its decision and final judgment in the case of Mr. Hoyt (and as well in the cases of Messrs. Aikens and Huegin), in all respects affirming the rulings, findings and judgment of the Municipal Court of Milwaukee County, with costs of suit. (Transcript 63.) A copy of the opinion of the court is found, pp. 65–6 Transcript.

As possibly the opinion of the court on *habeas corpus* sued

out before judgment should have been included in the record, for convenience it is printed as an appendix to this brief.

A writ of error from this court to the Supreme Court of Wisconsin duly allowed by the chief justice of that court and signed by the clerk of the Circuit Court of the United States for the Western District of Wisconsin was duly issued and served on March 11, A. D. 1902 (Transcript 1); and on the same day a citation to the defendant in error signed by the chief justice of the Supreme Court of the State of Wisconsin was duly issued and served upon the attorney-general of the state (Transcript 19), and a supersedeas bond in behalf of Mr. Hoyt for $1,000 was duly executed, and approved by the chief justice and filed in the office of the clerk of the Supreme Court of Wisconsin, and a stay of proceedings ordered. (Transcript 19–5.) With the writ of error from this court to the Supreme Court of the State of Wisconsin and duly served upon the clerk of that court, the plaintiff in error filed the following assignments of error, to wit:

(1) The Supreme Court of the State of Wisconsin erred in affirming the judgment of the Municipal Court of Milwaukee County in the State of Wisconsin, which overruled by its judgment the demurrer filed by the said Melvin A. Hoyt to the information filed in the said Municipal Court, and in holding that the said information stated a criminal offense.

(2) The Supreme Court of the State of Wisconsin erred in affirming by its judgment the findings and judgment of the said Municipal Court of the County of Milwaukee, in said State, and in adjudging the said Melvin A. Hoyt, plaintiff in error, guilty of a conspiracy as charged in the information filed in said last

mentioned court, and in imposing a fine and sentence in pursuance thereof on him, the said Melvin A. Hoyt.

(3) And the said Supreme Court of the State of Wisconsin further erred in affirming the judgment of the said Municipal Court in holding and adjudging that all or any of the several acts charged in the said information to have been performed or done by the said Melvin A. Hoyt, or agreed to be done or performed by him, singly or in combination with Andrew J. Aikens and Albert Huegin, the said co-plaintiffs in error with the said Melvin A. Hoyt, or either of them, were criminal, unlawful or prohibited combinations.

(4) That the said Supreme Court of the State of Wisconsin further erred in its said judgment by holding and adjudging that the provisions of Article XIV of the Amendments of the Constitution of the United States, though a construction of said article XIV was thereby necessarily drawn in question in such adjudication, were not a protection in the law of the said Melvin A. Hoyt against any combination, act or acts charged in said information to have been done or agreed to be done by the said Melvin A. Hoyt, either singly or in combination with the said Andrew J. Aikens and Albert Huegin, or either of them, whereby the said Melvin A. Hoyt was deprived of his rights, privileges and immunities secured to him by the said Article XIV of the Amendments of the Constitution of the United States, and of the liberty, property and due process of law secured to him as a citizen of the United States and of the State of Wisconsin.

(5) And the said Supreme Court of the State of Wisconsin further erred in holding and adjudging that section 4466a of Sanborn & Berryman's edition of the Revised Statutes of the

State of Wisconsin for the year 1898, though necessarily drawn in question in the aforesaid judgment of the said Supreme Court of the State of Wisconsin, was valid, and that the same was not repugnant to the Constitution of the United States, and especially to the said article XIV of the amendments to said constitution, and in sustaining the validity of said statute, and by holding as it did hold, a valid enactment; whereby the said Melvin A. Hoyt was deprived of his rights, privileges and immunities, as a citizen of the United States and of the State of Wisconsin, and of the liberty, property and due process of law secured to him by the said article XIV of the amendments to the Constitution of the United States.

And the said Melvin A. Hoyt prays that the judgment aforesaid may be reversed, annulled and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of the said judgment. (Transcript 21.)

The following is Section 4466a, R. S. of Wisconsin for A. D. 1898:

"BOYCOTTING, STRIKES AND LOCKOUTS.

"Injury to Business: Restraint of Will.—Section 4466a. "Any two or more persons who shall combine, associate, agree, "mutually undertake or concert together for the purpose of "wilfully or maliciously injuring another in his reputation, "trade, business or profession by any means whatsoever, or for "the purpose of maliciously compelling another to do or perform "any act against his will, or preventing or hindering another "from doing or performing any lawful act, shall be punished by "imprisonment in the county jail not more than one year or by "fine not exceeding five hundred dollars."

The assignment of errors filed under Rule X of this court

embraces substantially the same errors as those assigned in the court below. (Transcript 67.)

The information filed against the plaintiff in error follows the language of the Revised Statutes of Wisconsin, Section 4466a, excepting that the conspiracy and overt acts charged are preceded by the words "unlawfully and with the intent" which do not appear in the statute, and that the words "wilfully and maliciously" are used instead of "wilfully or." The information begins with the technical averment of a conspiracy between Hoyt, Aikens and Huegin at Milwaukee on April 5, 1900, "unlawfully, for the purpose and with the intent" then and there wilfully and maliciously of injuring the Journal Company and certain persons named as publishers of the Milwaukee Journal.

This averment is followed by a statement of facts in the nature of inducement—as (*a*) That said Journal Company is a corporation existing under the laws of Wisconsin and the owner and publisher of a daily newspaper and advertising medium called the Milwaukee Journal, published at said city of Milwaukee, and having a large circulation as such throughout the State of Wisconsin and elsewhere, and that its business was to print and sell such paper and to solicit, print and publish in said paper for hire, advertisements; and that at the time referred to, said company had a large number of advertisers and patrons of said paper and that a large proportion of its revenue was derived from advertising; that Nieman, Boyd and Schaum were stockholders in said paper and financially interested in its success; that Nieman was editor, Boyd manager and Schaum treasurer.

(*b*) That advertising rates which newspapers are entitled to charge depend and are based upon the circulation thereof, and

that early in the year 1900, said Journal Company established a new rate for advertising in the Journal, based upon its circulation, and gave notice to its patrons of such increased rate, which was about twenty-five per cent in excess of that charged by the same paper for the year 1899.

(c) That at the periods mentioned defendant Aikens was the publisher of the Evening Wisconsin, a daily published in said city, having an extensive circulation and devoted to the same purposes as those of the Journal, and that defendant Huegin during the like period was publisher of The Milwaukee Sentinel, a daily at said city, of extensive circulation and devoted to like purposes as the other papers named; and that defendant Hoyt during the same period was publisher of the Milwaukee Daily News at said city, devoted to the same purposes as the other papers named.

It is then charged as overt acts in execution of the alleged conspiracy that on the date and at the place aforesaid "for the purpose and with the intent then and there, of wilfully, maliciously and unlawfully injuring said Journal Company in its trade and business" and its officers and stockholders, Hoyt, Aikens and Huegin—

(1) Did confederate and agree that if any merchant or other person or corporation advertising or proposing to advertise in said Milwaukee Journal should pay or agree to pay to said Journal Company the said increased rate for advertising therein established by it, that in such case the person or corporation so advertising in the said Journal or proposing to so advertise therein should not be permitted to advertise in either of the said other three papers, to wit, the Sentinel, Evening Wisconsin or Daily News unless such merchant, person or corporation should

advertise in each of the said three papers and pay to each of them a corresponding increase over the rates theretofore charged by such three other papers respectively, to wit, about twenty-five per cent in excess of what said three papers respectively had theretofore charged for advertising; but in case any merchant, person or corporation should refuse to pay said Journal Company the said increased rate established by it for advertising in the Journal, that then and in that case such merchant, person or corporation so refusing should be at liberty to advertise in any or all of the other of said three papers at the rates which had theretofore been charged by said other three papers respectively.

(2) That the plaintiff in error, in pursuance of said last named agreement and understanding, notified the advertising patrons of the Journal of the making thereof; and that many of the advertising patrons of the Journal were thereby induced to withdraw their advertisements therefrom, greatly to the injury of the trade and business of the said Journal Company, its officers and stockholders.

(3) That in pursuance of said last named agreement the plaintiffs in error refused to allow the advertisements of divers merchants and other persons to be inserted in either of said three papers, the Sentinel, Evening Wisconsin or Daily News, and prevented the advertisements of divers merchants or other persons from appearing in all or any of said last three named newspapers, because such merchants or other persons so prevented had paid or agreed to pay said Journal Company the said increased rate established by it; and that by reason of said last named combination many merchants in Milwaukee and elsewhere were prevented from advertising in the Journal, greatly to the

injury of the business and trade of said Journal Company, its officers and stockholders, contrary to the statute in such case made and provided, etc.

II.

I have taken the foregoing statement from an incomplete draft of a brief prepared by my predecessor in this case, Mr. N. S. Murphey of Milwaukee. Mr. Murphey was an able, accurate and learned lawyer, for many years a partner of Senator Matthew Hale Carpenter, of Wisconsin. At the time of his death he was one of the leaders of the bar in the city where he had so long resided.

There would seem to be two questions arising under the Federal Constitution, clearly raised by the assignments of error and necessarily involved in the determination of this case.

First, is the right to do that with which plaintiff in error is charged in the information, secured by the Fourteenth Amendment? Second, if the first question be answered in the negative and the power of a state to interdict such conduct be affirmed, is the statute of Wisconsin in question a constitutional exercise of that power?

It is quite obvious that these two questions are not identical. For instance, some right to contract is undoubtedly secured by the Fourteenth Amendment. If a state should by legislative act prohibit all exercise of this right, and one criminally charged under such an act should assert its invalidity, it would be no answer to this contention to say that the legislature had constitutional authority to prohibit that kind of contract for making which defendant was prosecuted, and therefore it was immaterial

whether their attempted legislation transcended that power or not, as it must be held, *pro tanto*, valid.

The right to property is secured under this amendment. Suppose some state, acting under an impulse toward communism, should provide by law that no one, under penalty prescribed, should acquire or hold more than $20,000 in value of property of any kind. Thereupon a man is prosecuted under this act and urges its invalidity. But the property in question is intoxicating liquors, against which the state has power to legislate. In the absence of definite legislation as to this class of property, a general law in the terms indicated must be condemned, although the question was raised in respect of a holding of property that the legislature might have prohibited.

Connolly v. *Union, etc., Co.*, 22 Sup. Ct. Rep. 431, furnishes an illustration of this general proposition.

An effort will be made to answer both of these questions; the first in the affirmative, thus establishing the constitutional right of plaintiff in error, under the Fourteenth Amendment, to do that for which he was sentenced; the second in the negative, thus denying the power of the legislature of Wisconsin to pass the act in controversy, whatever may be thought of the first question. If the court is satisfied that either contention is sound, the judgment below must be reversed.

It seems necessary to examine the law somewhat to see whether at common law, and irrespective of statute, conduct like that of plaintiff in error amounts to an illegal combination or conspiracy. If it does, then no doubt a state may lawfully interdict it; if it does not, it is not necessarily true that the state may not prohibit it; but *prima facie*, this should be assumed in favor of

liberty. It is necessary therefore, secondly, to examine the decisions to ascertain the nature and extent of those rights to liberty guaranteed by the Fourteenth Amendment, so as to ascertain whether they extend so far as to protect the individual against all interference by the state, with such combination and competitive conduct as that charged in the information.

These topics call for all the citations required in this discussion.

The remaining and third question will be examined in the light of the authorities thus collected under the first two propositions, in an effort to show that the statute of Wisconsin as construed by the Supreme Court of that state is contrary to the Fourteenth Amendment; that, conceding *arguendo*, the power of the state to forbid that with which plaintiff in error stands charged, this statute is not a legitimate exercise of that power.

It should be said by way of preface that the plaintiff in error was originally arrested on a warrant issued from the police court in Milwaukee on complaint there filed. (Transcript 7.) On *habeas corpus*, the Circuit Court of Milwaukee County discharged plaintiff in error on the ground that the complaint showed no offense, thus sustaining, as I am informed, the contentions now urged. From the judgment of the Circuit Court an appeal was prosecuted to the Supreme Court and in that case the court promulgated its views *in extenso*, referring to that opinion briefly in rendering the judgment to reverse which this writ is prosecuted.

It is the opinion in that case, reported in 110 Wis. 189, that is appended to this argument.

I.

Fortunately this is not a labor controversy. There seems to be in all discussion of such questions something too much of bitterness and extravagance of assertion, from the just imputation of which the bench is not altogether free. (*v.* 116 Fed. Rep. 510–520 for marked examples of this.)

In this case the publishers of four newspapers in the city of Milwaukee got into a controversy over, apparently, that perennial apple of discord in the fraternity—the question of circulation. The Journal ostentatiously announced such an enormous increase in its circulation that it proposed to increase its rates twenty-five per cent. Thereupon the publishers of three other daily papers, the Sentinel, the Wisconsin and the News, agreed that if any one advertised in the Journal at these rates they would not receive his advertisement in their papers unless he paid them a similar increase in their rates and advertised in all their papers. The effect of this was obviously to discourage advertising in the Journal and thus promote the advertising patronage of the other papers. The learned court below does not seem to recognize this; but it is quite apparent, from the fact that the information charges that thus many merchants in Milwaukee and elsewhere were prevented from advertising in the Journal. (Transcript 13.) They would naturally be so deterred only by a desire or with the expectation of advertising in the other papers. And as the advertising in Milwaukee is limited, and as people must advertise, it is quite apparent, without engaging in any refined and abstruse calculations on the subject, that the less the Journal got, the more would fall to the other papers.

Is there anything illegal in such an arrangement at common law? Clearly not. It was entered into by those engaged in a private and not a public business. Those party to it were not numerous; its purpose was not illegal; it did not tend to raise the prices of advertising but rather the contrary. Any party to it had the right to refuse the advertisement of any one for a good reason, for a bad reason, for no reason, and to exact for its insertion whatever he saw fit. All acting together had a similar right. They were neither threatening, molesting nor dictating to the publishers of the Journal. They simply announced to the public the terms on which they would do business.

Advertising is in the nature of personal service. It is not the sale of goods nor even the sale of space. A publisher agrees to print and circulate an advertisement in much the same way that a bill poster agrees to post advertisements on his billboards. It is in law a contract for work and labor—possibly materials. No reason is perceived why the right of combination does not exist as between those rendering this service to the same extent that it might in other classes who work. But it is not every combination between those engaged in trade that is regarded as in restraint of trade or unlawful, much less criminal. The cases on this subject are numerous. I do not expect to comment on them all, but shall refer to enough to put this court in possession of all the authorities on the subject.

In this discussion the subject of conspiracy naturally suggests itself; for it is under that head that most of the authorities range themselves, though, singularly enough, if a modern investigator desires, in this country, to investigate the law of criminal

conspiracy, he will find the subject discussed with the greatest fullness in cases in chancery.

I premise any reference to cases with the general statement that at common law originally there was no such thing as a criminal conspiracy except in respect of some unlawful combination or agreement to procure the prosecution or indictment of an innocent person.

1 Chitty, Cr. Law, 1138.

The extent to which the law has progressed on this subject is remarkable and indeed rather alarming.

In a case hereafter cited the general subject was clearly treated; and I quote an extract for a lucid and compact statement as to the nature of conspiracy, either civil or criminal.

"I will deal now with the conspiracy part of the claim, respecting which much confusion and uncertainty seems somehow to have arisen, which I find it difficult to understand. I have no intention, however, to embark upon a history of the law relating to the subject, or to the old and obsolete writ of conspiracy. It would be useless for our present purpose. I will endeavor briefly to state how I view the matter practically, so far as it concerns this case.

A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is *wrongful and* harmful toward another person. It may be punished criminally by indictment, or civilly by an action on the case in the nature of conspiracy if damage has been occasioned to the person against whom it is directed. It may also consist of an unlawful combination to carry out an object not in itself unlawful by unlawful means. The essential elements, whether of a criminal or of an actionable conspiracy, are, in my opinion, the same, though to sustain an action special damage must be proved. This is the substance of the decision in *Barber* v. *Lesiter* (1). I quote as a very instruc-

tive definition of a conspiracy the words of a great lawyer, Willes, J., in *Mulcahy* v. *Reg.* (2), in delivering the unanimous opinion of himself, Blackburn J., Bramwell B., Keating, J., and Pigott B., which was adopted by this House: 'A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means. * * * The number and compact give weight and cause danger.'

It is true these words were uttered touching a criminal case, but they are none the less applicable to conspiracies made the subject of civil actions like the present."

Lord Brampton in *Quinn* v. *Leathem*, App. Cases, Law Reports (1901) 495–528.

It is to be noted in passing that in the definition given by the learned law lord, an alternative definition is "to do that which is *wrongful and* harmful toward another person." But the statute of Wisconsin, omitting the word "wrongfully," disregards the element of legal wrong and makes the combination to do injury or harm the gist of the offense.

The law of England on this subject is reviewed somewhat in the opinion below, and the learned justice, writing for the court, expresses himself thus on that subject:

"The late English doctrine seems not to be one of those changes which come from mere development; it is a revolution. The pressure of desire for freedom to combine, to monopolize trade and render combinations successful by the malicious destruction of the business of competitors, is not liable to find favor with the courts in this country, especially at a time when public opinion to the contrary is so strong that much of the time

of legislatures is occupied in inventing new methods of preventing combinations which are perfectly lawful by rules of the common law."

And thereupon the learned justice proceeds to extract some consolation from the opinion at the circuit in *Farmers L. & T. Co.* v. *N. P. R. R.*, 60 Fed. Rep. 803, quoting a paragraph therefrom.

As a distinguished member of this court has recently taken public notice of Mr. Dooley's celebrated dictum that the court follows the election returns, I may be pardoned for suggesting that the questions involved in this record are questions of law; that they must be determined, not upon those general considerations which might appeal to a legislature or secure popular approval, but in accordance with what this court conceives to be settled rules of constitutional law. And I can but regard the language quoted as indicative of a disposition on the part of the court below to disregard these salutary limitations upon judicial action.

The citation made by the learned justice would have been more persuasive had not the case cited been reversed in the Court of Appeals and the views of the Circuit Court expressed in the quotation made, explicitly repudiated by Mr. Justice Harlan in delivering the opinion of the reviewing court. That case will be discussed hereafter. I pass now to some citation of the recent cases in England.

It is not intended to comment at any length upon the various opinions in the case of *Mogul Steamship Co.* v. *McGregor*, but it may not be improper to call the attention of the court to some observations by Lord Coleridge, before whom that case was origi-

nally heard. 59 Law Times Reports, 514; S. C. Appeal Cases 25 (1892).

In the course of his opinion, he said:

"It seems to me it was no more in restraint of trade, as that phrase is used for the purpose of avoiding contracts, than if two tailors in a village agreed to give their customers five per cent off their bills at Christmas, on condition of those customers dealing with them, and with them only. Restraint of trade, with deference, has in its legal sense nothing to do with this question."

Again:

"It must be remembered that all trade is, and must be, in a sense selfish. Trade not being infinite—nay, the trade of a particular place or district being possibly very limited, what one man gains another loses. In the hand-to-hand war of commerce, as in the conflicts of public life, whether at the bar, in parliament in medicine, in engineering, men fight on without much thought of others, except a desire to excel or to defeat them. Very lofty minds like Sir Philip Sidney with his cup of water, will not stoop to take an advantage if they think another wants it more. Our age, in spite of high authority to the contrary, is not without its Philip Sidneys; but these are counsels of perfection which it would be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business."

The opinions of Lord Herschell and Lord Coleridge, both of whom were known to some, at least, of the members of this bench, are entitled to and will no doubt, receive attentive consideration; and the extract just made well illustrates the lettered and attractive style of the versatile and gifted chief justice.

When this case got into the House of Lords the question was elaborately discussed and it may be that some of the lords regarded this contract as one that was unlawful or illegal in the sense of being non-enforceable, but not actionable or criminal. The parties in that combination being common carriers, I think

probably a different principle applies from what is applicable to the case in hand. But on the general subject as to the right of free competition, I desire to quote a few sensible words from the opinion of Lord Morris.

"Now as to the contention that the combination was in restraint of trade, and therefore illegal. In the first place was it in restraint of trade? It was a voluntary combination. It was not to continue for any fixed period, nor was there any penalty attached to a breach of the engagement. The operation of attempting to exclude others from the trade might be, and was in fact, beneficial to freighters. Whenever a monopoly was likely to arise, with a consequent rise of rates, competition would naturally arise. I can not see why judges should be considered specially gifted with prescience of what may hamper or what may increase trade, or of what is to be the test of adequate remuneration. In these days of instant communication with almost all parts of the world competition is the life of trade, and I am not aware of any stage of competition called "fair" intermediate between lawful and unlawful. The question of "fairness" would be relegated to the idiosyncracies of individual judges. I can see no limit to competition, except that you shall not invade the rights of another."

Mogul Steamship Co. v. *McGregor*, 66 Law Times Rep 1-9.

The great case of *Allen* v. *Flood* can hardly be passed by in this discussion although it is rather difficult, apparently, to determine exactly what was decided in that case and it is perhaps not altogether clear how the same great tribunal has since regarded what was there actually determined. *Allen* v. *Flood*, 77 Law Times Reports, 717; S. C. App. Cases 1 (1898).

It seems to have been held that to induce a master to discharge a servant, if the discharge does not involve a breach of contract, or to induce a person not to employ a servant, though

done maliciously and resulting in injury to the servant, does not give him any cause of action. All previous authorities on this vexed question are carefully examined and reviewed, including the case of *Mogul Steamship Co.* v. *McGregor*, Appeal Cases, 1892, 25, S. C. 66 Law Times Rep. 1, just cited.

Lord Herschell wrote one of the prevailing opinions in this case and in the course of it laid down a very important principle, of which judges sometimes seem to be unmindful. He said:

"I am not behind my honorable and learned friend in the desire to preserve individual liberty, but I think it is never in greater danger than when a tribunal is urged to restrict liberty of action because the manner in which it has been exercised in a particular instance may be distasteful."

Lord McNaghten concurring, among other things, said:

"Suppose a person of position takes away his custom from a country tradesman in a small village, merely to injure him on account of some fancied grievance not connected with their dealing in the way of buying or selling, no one, I think, would suggest that there could be any remedy at law in any of these cases. But suppose a customer, not content with taking his own custom, says something not slanderous or otherwise actionable or even improper in itself to induce a friend not to employ the tradesman any more; neither one nor the other is liable for taking away his own custom. Is it possible that the one can be made liable for inducing the other not to employ the person against whom he has a grudge? If so, a fashionable dressmaker may now and then, I fancy, be plaintiff in a very interesting suit. The truth is that questions of this sort belong to the province of morals rather than to the province of law. Against spite and malice the best safe-guards are to be found in self-interest and public opinion. Much more harm than good can be done by encouraging or permitting inquiries into motives when the immediate act alleged to have caused the loss for which redress is sought, is in itself innocent or mutual in character, and one which anybody may do or leave undone

without fear of legal consequences. * * * I should like to add that in my opinion the decision of this case can have no bearing on any case which involves the element of *oppressive combination*, the vice of which seems to me to depend on considerations which are conspicuously absent in the present case."

Lord Shand recognized the distinction between a malicious purpose to ruin or injure, animating a combination of different persons, and a combination in pursuit of a legitimate trade advantage, and referring to the suggestion of counsel that a disapproval of the law laid down in a certain case, would be attended with dangerous consequences, as removing a certain amount of restraint, introduced by that case; he said:

"But if that measure of restraint was not founded, as I believe it was not, on sound legal principle, it is only right that by legal decision in this court of last resort, it should be removed. And if the force of combination should be harshly or oppressively used—if it should be used under circumstances in which right-minded men would deplore its use—it must be observed that those against whom combination is so employed, have precisely the same liberty of action for resisting oppressive measures, and for causing those who use them to desist from that course of action."

Lord James, of Hereford, offered some valuable observations, as follows:

"But I am aware that it was urged at the bar that even if the views which I have expressed to your lordships be correct, there is an exception from general principles in favor of those, whose trade or employment has been interfered with. I do not assent to this view. Before discussing the question it is necessary that some definition of the words, 'interfered with,' in their legal sense, should be given.

Every man's business is liable to be 'interfered with' by the action of another and yet no action lies for such interference. Competition represents 'interference' and yet it is in the inter-

est of the community that it should exist. A new invention utterly ousting an old trade would certainly 'interfere,' with it.

If, too, this loose language is to be held to represent a legal definition of liability, very grave consequences would follow. Of course, the conduct of the boilermakers in the case before your lordships amounted to an interference with the plaintiff's business, and yet, as has been pointed out, it is not said that an action lies against them. Every organizer of a strike in order to obtain higher wages 'interferes with' the employer carrying on his business; also every member of an employers' federation, who persuades his co-employer to lock out his workmen must 'interfere with' those workmen. Yet I do not think it would be argued that an action can be maintained in either case on account of such interference. But, whatever meaning may be attached to the words 'interfered with,' I see no ground for saying that any different rule should be applied to cases of interference with a man when carrying on his trade or business or when he is engaged in any other pursuit."

Quinn v. *Leathem*, Appeal Cases (1901) 495, is one of the most recent decisions of the House of Lords upon the question of trade combinations and conspiracies.

Before discussing it, a curious remark of the Lord Chancellor, Halsbury, merits notice. He states his wish to make two observations of a general character and, having made the first, proceeds:

"The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

Substituting the word "court" for law in the last line, a familiar, though possibly somewhat humiliating truth is recorded. In this way the learned Lord Chancellor seems to excuse what looks

like a departure from *Allen* v. *Flood*, where he dissented. On this subject the language of a great English judge may well be quoted.

"The law would be a strange science if it rested solely upon cases; and if after so large an increase of commerce, acts and circumstances accruing, we must go to the time of Rich. I to find a case, and see what is law. Precedent indeed may serve to fix principles which for certainty's sake are not suffered to be shaken, whatever might be the weight of the principle independent of precedent. But precedent, though it be evidence of law, is not law in itself; much less the whole of the law."

Lord Mansfield in *Jones* v. *Randall*, Lofft's Rep. 383–5.

The law of any one jurisdiction ought to be logical and to develop logically and consistently in accordance with settled principles from precedent to precedent. In so far as it fails in this regard, human fallibility and error frustrate the theories of an enlightened and elevated science.

This result may be expected and its causes recognized and deplored; but they should not be judicially canonized as approved and classical agencies for the development of the law.

Quinn v. *Leathem* was a case where a butcher, Leathem, the plaintiff, employed non-union men. He offered to pay all fines, etc., for his men and asked to have them admitted to the union with which defendants were connected. The union refused this, insisted that he discharge his men and finally compelled Munce, a large buyer from plaintiff, to cease to buy of him by threatening to order Munce's men to quit work. He thereupon ceased to do business with plaintiff and the suit was brought and a recovery sustained in the Lords.

Had this been only a case where the defendants among

themselves had agreed not to deal with plaintiff unless he employed union labor, no recovery would have been allowed.

At least such seems to be clearly the ruling from the opinions of the various law lords to which, in spite of the *dictum* of the Lord Chancellor, it would seem some reference should be permitted

It seems also to have been held that the mere fact that parties agree or combine not to buy of others so long as the latter sell to a certain person is not actionable so far as such person is concerned.

It would appear to be the purport of this decision that men are free either singly or in combination to deal with whom they will and upon such terms as they will; but that they are not justified in seeking to dissuade one man from trading with another by threatening to break up the former's business through calling strikes among his men and similar interference and annoyances.

The opinion of the Lord Chancellor seems to call for no discussion. That of Lord Shand was brief. In the course of it he sustains the recovery on the ground that the defendants "acted by conspiracy, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in trade." *p. 515* v. et 514.

The two principal opinions are those of Lord Brampton and Lord Lindley.

The opinion of the former quotes from Halsbury "All are free to trade upon what terms they will" (p. 525–527), and seems (p. 528) to agree with Lord Shand in the point just referred to.

Lord Lindley discussed the law at great length. Among other things he said:

"A combination not to work is one thing, and is lawful. A

combination to prevent others from working by annoying them if they do is a very different thing, and is *prima facie* unlawful." (p. 538.)

I digress to quote an observation which, rightly considered, is most important in the law of conspiracy, either civil or criminal:

"My lords, it is said that conduct which is not actionable on the part of one person can not be actionable if it is that of several acting in concert. This may be so where many do no more than one is supposed to do. But numbers may annoy and coerce where one may not." Ib. 538.

On the right to deal or not to deal with others, and in this regard to act singly or in combination, this was said:

"Amongst the American cases I would refer especially to *Vegelahn* v. *Guntner* (1), where coercion by other means than violence, or threats of it, was held unlawful. In this country it is now settled by the decision of this House in the case of the Mogul Steamship Co. (2) that no action for a conspiracy lies against persons who act in concert to damage another and do damage him, but who at the same time merely exercise their own rights and who infringe no rights of other people. *Allen* v. *Flood* (3) emphasizes the same doctrine. The principle was strikingly illustrated in *The Scottish Co-operative Society* v. *Glasgow Fleshers' Association* (4), which was referred to in the course of the argument.

In this case some butchers induced some salesmen not to sell meat to the plaintiffs. The means employed were to threaten the salesmen that if they continued to sell meat to the plaintiffs, they, the butchers, would not buy from the salesmen. There was nothing unlawful in this, and the learned judge held that the plaintiffs showed no cause of action, although the butchers' object was to prevent the plaintiffs from buying for co-operative societies in competition with themselves, and the defendants were acting in concert.

The cardinal point of distinction between such cases and the present is that in them, although damage was intentionally inflicted on the plaintiffs, *no one's right was infringed—no wrong-*

ful act was committed; whilst in the present case the coercion of the plaintiff's customers and servants, and of the plaintiff through them, was an infringement of their liberty as well as his, and was wrongful both to them and also to him, as I have already endeavored to show.

Intentional damage which arises from the mere exercise of the rights of many, is not, I apprehend, actionable by our law as now settled. To hold the contrary would be unduly to restrict the liberty of one set of persons in order to uphold the liberty of another set. According to our law, *competition with all its drawbacks, not only between individuals, but between associations, and between them and individuals,* is permissible, provided nobody's rights are infringed. The law is the same for all persons, whatever their callings; it applies to masters as well as to men; the proviso, however, is all-important, and it also applies to both, and limits the rights of those who combine to lock out as well as the rights of those who strike. But coercion by threats, open or disguised, not only of bodily harm but of serious annoyance and damage, is *prima facie,* at all events, a wrong inflicted on the persons coerced; and in considering whether coercion has been applied or not, *numbers* can not be disregarded." 539–540.

This decision is followed in

Read v. *Friendly Society of Operative Stonemasons*, App. cases (1902), S C. 86 L. T. Rep. 593.

The Scottish case cited with approval by Lord Lindley in *Quinn* v. *Leathem* is *Scottish Co-operative, etc., Society* v. *Glasgow Fleshers', etc., Association*, 35 Scottish Law Rep. 645, decided by Kincairney, Lord Ordinary.

It there appeared that an association of butchers at Glasgow told cattle salesmen who sold cattle at auction there, that they would not in future bid at such sales, unless the salesmen declined to receive bids made by the co-operative stores. Thereupon the salesmen inserted a notice in their conditions of sales that they would not accept bids from any one representing co-oper-

ative stores and did in fact, refuse such bids. The sales in question were held on a public wharf, where any one was entitled to transact business or to act as salesman; but it was for the time being the only place in Scotland licensed for the landing of American and Canadian cattle. The co-operative stores sued for injunction against the salesmen and for damages against the butchers.

It was held that the action must fail, because the salesmen might rightfully insert the conditions of sale complained of; and the butchers might properly induce the salesmen to do an act in itself lawful, so long as they adopted only lawful means to that end.

Discussing the case in his opinion the Lord Ordinary said: (p. 645.)

"Any single Glasgow butcher might resolve not to bid at the auctions of salesmen who received the bids of the co-operative societies. He would, of course, be free to bid or not bid as he pleased—nobody could compel him. Clearly also, he might inform the salesmen of his resolution, and he might go the length of asking them to exclude the co-operative store bidders. Such a man would, of course, be laughed at for his pains. But the case would be widely different if a number of butchers took that course ; and here the question of conspiracy comes in assuming that there was a conspiracy. It was indeed suggested by the first defenders that there could not possibly be a conspiracy in this case because the salesmen were not implicated, and the Glasgow Fleshers' Trade Defense Association formed only one *persona*. But I think there is more subtlety in that argument. The Association is formed of a number of individuals competent to conspire ; and I think it would not be a great abuse of words to speak of the Association as in itself a conspiracy. After all the name does not signify. A conspiracy, combination, or association, is, after all, nothing but a kind of contract. But assuming

conspiracy, it is not easy to see what the first defenders did which could subject them in damages. They were entitled to resolve to abstain from bidding at sales at which co-operative bids were received. It was entirely at their option to do that or not. They might also legally allow their resolution to that effect to become public, and probably that would have been all that was necessary. It is true that they went further—probably unnecessarily. They communicated their resolution to the salesmen specially; they called on them to yield to it; and in that manner they procured, and are no doubt responsible for procuring, the action of the second defenders of which the pursuers complain. In the Mogul cases the defendants, being a combination or conspiracy, intimated to certain shippers that they would not do business with them if they did business with the plaintiffs, and even that if they did so they would demand repayment of rebates previously allowed. But that was held to be legal. The distinction between the action of one and that of several has no doubt been taken by various judges in England in different cases, although it does not appear to be clearly established. But I confess I am not able to think that it matters here. It appears to me that the fleshers acted within their legal rights. It may be regrettable that they happened to have so much in their power. That is the accident of their position and of the peculiar character of the foreign cattle market. In *Flood* v. *Allen*, Lord Shand is reported to have said that a 'combination of different persons in pursuit of a legitimate trade occurred in the case of the Mogul Ship Company, and was there held to be lawful. Combination for no such object but in pursuit really of a malicious purpose to ruin or injure another would, I should say, be clearly unlawful.'

"That may be so; but I think that this case is strictly analogous to the case of the Mogul, and is not a case of mere malicious purpose—*a case which indeed must occur seldom if at all in business transactions.* I think I am entitled to regard this case as really governed by the case of the Mogul; although I propose to decide it without a proof, because I accept the pursuers' averments and assume nothing against them except that the first defenders, an association of Glasgow fleshers, *did not act wholly*

from malice, but at least in part from a regard to their own interest, protection and defense, which is averred by the defenders and not denied by the pursuers."

It would appear to be exceedingly difficult to distinguish this case from that now before the court if the effect to be given to the statute of Wisconsin be excluded, *pro tempore*, from consideration. It is true the learned court below declares it quite impossible on this record to discover any motive on the part of plaintiffs in error except a purpose to inflict wanton and malicious injury on the victims of their conspiracy with no corresponding benefit to themselves.

It is, perhaps, material here to note that the information charging the intent and purpose of the conspirators to injure, does not aver that this was their only purpose; a similar omission existed in the Scottish case and was relied upon by the Lord Ordinary; and although that case was heard without proof the court felt warranted in drawing the obvious deduction from the plaintiffs' or pursuers' pleadings that the butchers were animated, not only by the purpose alleged, but by a desire to promote their own advantage.

With great deference to the learned court below, the one remarkable circumstance in this case is, that the very learned and able opinion upon the *habeas corpus* proceeding, which is substantially the opinion under examination, should not only fail to admit a similar inference here, but should deny that such a deduction is even conceivable. Men in business are keenly alive to self-interest. It is seldom, in that commercial co-operation now so universal and whose rising tide courts and legislatures are alike impotent to stay, that anything but pros-

pective advantage to those combining their efforts or capital is regarded. The common criticism is that greed of gain, *auri sacra fames*, drives men to disregard those "counsels of perfection" which possibly a broad humanity and a true recognition of the just demands of a benign civilization should suggest. But this desire for self-aggrandizement is almost always, if not invariably, the real motive for such efforts, and it is uniformly and universally recognized as such. The activities of men in finance, in commerce, in professional life, in politics, and even to some extent in religion, are habitually explained upon some theory as to prospective personal advantage or profit thus sought to be secured.

It is sometimes said that this is ignoble; yet, after all, there are worse things. The ethics and methods of the bourse and the forum are certainly an advance upon those of Dick Turpin, or a Corsican vendetta. To assume, for a moment, that the gentlemen now before this court—men of character, intelligence and position, engaged in the business of publishing newspapers in a great community—were actuated by any other or more reprehensible motive than a purpose to promote the pecuniary success of the enterprises in which they were concerned, at the expense, possibly, of a rival publication, is, with all deference to the court below, entirely inadmissible.

Not only is the Scottish case thus favorable to the contention, but accepting *Quinn* v. *Leathem* as attaching some qualification to *Allen* v. *Flood*, or to the opinions expressed in that case, and as an authoritative exposition of the law of England, it clearly condemns the theories of the court below. The language of Lord Lindley and the other law lords is explicit.

The Glasgow case was expressly approved, and the theories contended for were fully sustained.

I cite, indiscriminately, civil and criminal cases; for, bearing in mind that damage, following criminal concert, is necessary before a civil suit will lie, the rules of law are essentially the same, with this exception, in both classes of cases.

It sufficiently appears that the impression of the learned court below that its judgment was inconsistent with modern English law is entirely correct.

It will appear that it is equally unwarranted by the decisions in this country, to which some reference will now be made. There is a case quite in point decided many years ago in Louisiana.

In an action against three insurance companies brought by the master of a steamboat to recover damages for having conspired and agreed with each other maliciously and without cause, except the imposition by plaintiff of reasonable charges for carrying certain freight, not to insure anything on any steamer on which he was employed, it was held on exception to plaintiff's petition that his action would not lie.

The court, per Merrick, C. J., said:

"Undoubtedly, either of the defendants had the right separately to decline taking any risk on any boat on which the plaintiff should be employed as master. Nor could the motives of the company be questioned; whether they were malicious and with the sole design of injuring the plaintiff or not, would be entirely immaterial in a legal point of view, so long as there was no contract on their part and no legal obligation to insure such boat. Courts can enforce only legal obligations and redress injuries to legal rights. 4 Rob. 68; 8 Rob. 84.

Does the fact that the three insurance companies conspired

and agreed with each other that they would not insure on any boat on which the plaintiff should be employed in order to prevent him from obtaining employment, change the character of their acts?

It is difficult to perceive in what respect the combination of three insurance offices out of all the companies of this city should change the character of acts otherwise conceded to be lawful. The companies had the right to say separately, that they would not insure any boat on which the plaintiff should be employed, and we can see no good reason why the three companies, whether they felt themselves aggrieved by plaintiff's charges or not, might not say so in concert."

Orr v. *Home Ins. Co. et al.*, 12 La. Ann. 255.

A similar case, also decided some years ago, arose in Missouri. In *Hunt* v. *Simonds et al.*, 19 Mo. 583–585, the opinion proceeds thus:

"The petition in this case charges the defendants, who are officers of various insurance companies in St. Louis, with having combined, confederated and conspired willfully and maliciously to injure and wholly ruin the plaintiff in his trade and occupation as commander of a steamboat, and having for that purpose and with the intent of effecting the object refused, without cause, to take any insurance upon his boat, whereby he was deprived of all benefit from his occupation, and was compelled to sell his boat and abandon his business. This is the strongest statement of the plaintiff's case, set out in his petition. To this petition there was a demurrer, which was sustained by the court below, and the case is brought here to determine the sufficiency of the petition.

1. Among the numerous cases which have been examined there has been not one found which presents an aspect like the present. All the cases in which damages have been recovered for injuries produced by individuals conspiring against another, are cases in which some positive act was done by the defendants, in pursuance of a common intent. Here the damage to the plaintiff is alleged to have been produced by the refusal of the

defendants to make contracts in the ordinary line of their business. *It is obviously the right of every citizen to deal or to refuse to deal with any other citizen, and no person has ever thought himself entitled to complain in a court of justice of a refusal to deal with him,* except in some cases where by reason of the public character which a party sustains, there rests upon him a *legal obligation* to deal and contract with others."

In the babel of modern authorities it is a great relief to turn to some of these earlier decisions in which the courts boldly and clearly announce general principles of law, as if they intended to stand by them and did not expect to be thereafter compelled to attempt their ingenious evasion in order to decide a later case as it ought to be decided on the merits. Possibly the complex nature of modern affairs imposes difficulties in this regard which an earlier and simpler organization of society did not present. But it sometimes seems as if a court to-day were too anxious, to borrow a favorite phrase in a busy age, to "get results."

It was held in Maine that no action would lie by the owner of a house against one who maliciously refused to employ any tenant of such house and thus prevented the owner from renting it. *Heywood* v. *Tillson*, 75 Me. 225.

There is considerable examination and review of the authorities there to sustain the proposition, quoted from Judge Cooley on Torts, "That the exercise by one man of a legal right can not be a legal wrong to another," and this quite irrespective of the motive of the defendant. The same case is reported in 46 Am. Rep. 373.

An association of master plumbers sent notices to wholesale dealers not to sell to others than members of the association under penalty of a withdrawal of latter's patronage. The whole-

sale dealers thereupon refused to sell to non-members who were in consequence unable to buy from wholesale dealers in that state or elsewhere.

Certain master plumbers, not members of the association, filed a bill in respect of these matters which the court dismissed for want of equity.

Macauley Brothers v. *Tierney*, 19 R. I. 255.

The Mogul Steamship Co. case.

Bohn & Co. v. *Hollis*, 54 Minn. 223.

Cote v. *Murphy*, 159 Penn. St. 420.

Heywood v. *Tillson*, 75 Me. 225, and many other cases were cited, and the court said:

"It is doubtless true, speaking generally, that no one has a right, intentionally, to do an act with intent to injure another in his business. Injury, however, in its legal sense, means *damage* resulting from *a violation of a legal right*. It is this violation of a legal right which renders the act wrongful in the eye of the law and makes it actionable. If, therefore, there is a legal excuse for the act it is not wrongful, even though damage may result from its performance.

The cause and excuse for the sending of the notices, it is evident, was a selfish desire on the part of the members of the association to rid themselves of the competition of those not members, with a view to increasing the profits of their own business. The question, then, resolves itself into this: was the desire to free themselves from competition a sufficient excuse in legal contemplation for the sending of the notices?

We think the question must receive an affirmative answer. Competition, it has been said, is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival and attracting it to himself is an act intentionally done, and, in so far as it is successful, to the injury of the rival in his business, since to that extent it lessens his gains and profits. To

hold such act wrongful and illegal would be to stifle competition. Trade should be free and unrestricted; and hence every trader is left to conduct his business in his own way, and can not be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of the class of which fraud, misrepresentation, intimidation, coercion, obstruction or molestation of the rival or his servants or workmen and the procurement of violation of contractual relations, are instances."

In a recent case in West Virginia,

Bohn v. *Hollis*, 54 Minn. 223,

Carew v. *Rutherford*, 106 Mass. 1,

Com. v. *Hunt*, 4 Met. 111,

Mogul S. Co. v. *McGregor*, 23 Q. B. Div. 598.

Huttley v. *Simmons*, 1 Q. B. Div. (1898), 181,

were cited with apparent approval.

Transportation Co. v. *Oil Co.*, 50 W. Va. 611.

The defendants were sued virtually in case for conspiracy to injure plaintiff. The court on demurrer to the declaration said, among other things:

"So far this first count charges only the exercise by the defendants of a right of *constitutional liberty*, accorded alike to all, simply the right of self-advancement in legitimate business, self-preservation, we may say. That in these days of sharp, ruinous competition some perish is inevitable. The dead are found strewn all along the highways of business and commerce. Has it not always been so? Will it always be so? The evolution of the future must answer. What its evolution will be in this regard, we do not yet know; but we do know that thus far the law of the survival of the fittest has been inexorable. Human intellect, human laws can not prevent these disasters. The dead and wounded have no right of action from the working of this imperious law. This is a free country; liberty must exist. It is for all. This is

a land of equality, so far as the law goes, though some men do in the lust of gain get advantage. Who can help it? (p. 621.)

At p. 624 it is said:

"One may without liability induce the customers of another to withdraw their custom from him, in the race of competition, in order that the former may himself get the custom, there being no contract; and it is no matter that such person is injured, and it is no matter that the other party was moved by express intent to injure him, motive being immaterial where the act is not unlawful. But where the act is not done under the right of competition, or under the cover of friendly, neighborly counsel, but wantonly or maliciously, with intent to injure another it, is actionable, if loss ensue, nor is it material in the latter case that there was no binding contract between the business man and his customers."

This latter extract touches a point much discussed, the weight to be given to the motive justly ascribable to those charged with conspiracy to injure. It is true that the opinion of the court below proceeds much on this distinction. But it should be particularly noted in this connection as this discussion precedes so much of this brief as deals with constitutional questions that this case declares the right to employ methods virtually those under examination here, to be a "right of *constitutional liberty*" accorded to all.

An interesting and important case is

Bohn Mfg. Co. v. *Hollis et al.*, 54 Minn. 223, etc., 40 Am. St. 319.

An agreement between retail lumber dealers that they would not deal with any wholesaler who sold to retail customers at a point where a member of the association was doing business was held lawful; and injunction was denied to a wholesaler who,

having sold to such a customer, sought to have the association restrained from notifying its members of such sale.

On the "unformulated truth" which Mr. Justice Holmes has supposed may exist under cover of the idea that what is right for one to do may be wrong for many, *Vegelahn* v. *Guntner*, *infra*, the court makes a discreet observation, p. 234:

"It can never be a crime to combine to commit a lawful act but it may be a crime for several to conspire to commit an unlawful act, which, if done by one individual alone, although unlawful, would not be criminal."

To which may be added this suggestion, that an act done, though maliciously by one may be lawful, though if many simultaneously and with like motive do the same thing, it becomes unlawful; the result accomplished, *i. e.*, the thing done in the two instances being not at all the same thing.

It is certainly quite lawful to go to church. One man might go maliciously, because he knew his presence there deterred others from attending. But for twice the number that could be accommodated to attend regularly with like purpose is a very different matter. The thing done in one case would be one man going; the thing done in the other perhaps a thousand going. It is the motive of the thing done and its necessary effect that differentiate the two cases. If the thousand men acting with malicious motive should conspire with like evil intent to induce one to go, would he or they be any more criminal than he would if he went *sua sponte*?

This always has seemed to me a distinction overlooked in the discussions of the oft cited case of hissing in a theater. The noise and disturbance created by one man in hissing is one thing; that made by 500 or 1,000 acting together is certainly

not the same thing, and in this sense there is no such thing, as a thousand men acting together doing the same thing that one does. Each of the thousand does the same thing that the others do; but all together, they do a very different thing.

In summing up the Minnesota case the court said:

"With these propositions in mind, which bring the case down to a very small compass, we come to another proposition which is entirely decisive of the case. It is perfectly lawful for any man (unless under contract obligation or unless his employment charges him with some public duty) to refuse to work for or to deal with any man or class of men, as he sees fit. This doctrine is founded upon the fundamental right of every man to conduct his own business in his own way, subject only to the condition that he does not interfere with the legal rights of others. And, as has been already said, the right which one man may exercise singly, many, after consultation, may agree to exercise jointly, and make simultaneous declaration of their choice. This has been repeatedly held as to associations or unions of workmen, and associations of men in other occupations or lines of business must be governed by the same principles. Summed up and stripped of all extraneous matter this is all that defendants have done or threatened to do and we fail to see anything unlawful or actionable in it."

It was held in an Indiana case that a storekeeper has no right of action against a school teacher and members of a school board because they maliciously dissuade pupils by threats or otherwise from trading with him, no dishonest or libelous statements being imputed to defendants.

Guethler v. *Altman*, 26 Ind. App. 587.

A recent case dealing with the principles involved in this discussion is found in Ohio.

N. Y. C. & St. L. R. R. v. *Schaffer*, 65 Ohio. St. 414; S. C. 87 Am. St. Rep. 628.

A discharged employe of the defendant railway sued, claiming that the defendant and other similar companies had entered into a conspiracy that they would furnish one another information as to all employes who had committed or were charged with offenses or had quit work during the railroad strike of 1894 and were members of a certain labor union of railway employes and that no company would employ any person without a release or consent of the company by whom he had been employed called by railroad men a clearance. This having been refused to plaintiff by defendant as he claimed willfully, maliciously and in pursuance of such conspiracy, he sued and recovered a judgment in the court of trial which was reversed by the Supreme Court.

The court said, p 420:

"It is the undoubted and unabridged natural right of every individual not to employ, or to refuse to employ whomsoever he may wish, and he can not be called upon to answer to the public or to individuals for his judgment. Nor can the motives which prompt his action be considered. In general terms such right is as much inherent in corporate bodies as in natural persons. But whatever one person may lawfully do, two or more persons may join in doing. There can be no such thing as a conspiracy to do a lawful thing unless by unlawful means. If one railroad company may lawfully refuse to continue in its employ a person who has been engaged in a war upon its interests, called a strike, or who has shown himself to be negligent, incompetent, inefficient or dishonest, there does not appear to be any good reason why a number of railroad companies might not agree among themselves to not employ such a person."

The court quotes also with apparent approval from the dissenting opinion of Chief Justice Field in *Vegelahn* v. *Guntner*, 167 Mass. 103; s. c., 57 Am. St. 443.

The dissenting opinion of Mr. Justice Holmes in that case

contains much profound and philosophic suggestion upon this subject. He says:

"The policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business by some means, when the damage is not done for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade. In such a case it can not matter whether the plaintiff is the only rival of the defendant, and so is aimed at specifically, or is one of a class all of whom are hit. The only debatable ground is the nature of the means by which such damage may be inflicted."

But under the Wisconsin statute apparently no debate on this subject is permitted. Two or more persons who combine for the purpose of willfully (*i. e.*, intentionally) *or* maliciously injuring another in his business *by any means whatsoever*, are within its denunciation.

Indeed, on the proposition that an intent to injure in lawful competition is admissible the majority and minority of the court in that case do not seem to differ.

The learned justice also says:

"It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination and that the organization of the world, now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental conditions of life, are to be changed."

And further:

"The fact that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist does not necessarily make it unlawful, any more than when a great house lowers the price of certain goods for the purpose,

and with the effect, of driving a smaller antagonist from the business."

To these just and thoughtful observations I venture to add the language of an able and accurate judge in a much earlier case.

"Commerce can not require anything which is unreasonable or unjust; but what experience shows that her convenience does require, that she will have, for it will be still adhered to by the common consent of the commercial world; and if the courts should refuse to enforce it with the few who refuse to conform to such a general custom, the moral sense of commercial men will apply its still more coercive influence, which few will withstand." p. 38.

Chief Justice Caton in *Munn et al.* v. *Birch*, 25 Ill. 35–41.

In *Buchanan* v. *Kerr et al.*, 159 Penna. St. 433, the court said, following *Cote* v. *Murphy*, Ib. 420, trespass for conspiracy:

"There was no evidence of a combination to break down Buchanan in his business as a contractor or builder. The evidence showed a lawful combination of workmen engaged in the building trades, to advance wages, by demanding that in the future the employers pay for eight hour's work the same wages that had theretofore been paid for nine hours. The defendants were members of an association of employers which by combination resisted this demand. This combination agreed among themselves they would not sell material to contractors who conceded the advance, would not do work of any kind for them. In pursuance of this agreement they refused to furnish material to plaintiff or to work for him, because, as they believed, he was aiding the striking workmen in their attempt by combination to advance the price of labor."

It was held there could be no recovery and a judgment for plaintiff was reversed.

I now propose to consider briefly some of the controlling decisions in Massachusetts and New York on this general topic.

In the leading case of *Com.* v. *Hunt*, 4 Met. 111, the subject of trade conspiracy was much discussed.

The defendants were members of the Boston Journeymen Bootmaker's Society. It appeared by the indictment that they agreed not to work for any one who should employ any journeymen or other person not a member of their society after notice given him to discharge such workman. It also appeared by the second count that they thus compelled one Isaac B. Wait to discharge one Jeremiah Horne.

The third count charged a conspiracy to impoverish Horne, etc., and acts thereunder.

The fourth, a conspiracy to impoverish him without stating the means.

The fifth, a conspiracy to impoverish employers by preventing them from employing journeymen, not members of the society.

The court, per Shaw, C. J., held the indictment bad and arrested the judgment.

The chief justice says, among other things:

"Stripped, then, of these introductory recitals and alleged injurious consequences, and of the qualifying epithets attached to the facts, the averment is this: that the defendants and others formed themselves into a society, and agreed not to work for any person who should employ any journeyman or other person, not a member of such society, after notice given him to discharge such workman."

In this case the three defendants agreed not to work for any one who should employ the Milwaukee Journal except on certain terms publicly announced. The analogy is perfect, save that in the small number here combining, the element to which

Willes, J., refers in the extract quoted as giving weight and causing danger, is wholly wanting. Yet this great judge held the defendants entitled to their discharge on motion in arrest of judgment after verdict against them.

The chief justice, after declaring the manifest intent of the association to be to induce all engaged in the same occupation to become members of it and that this was not an unlawful object, further said:

"Nor can we perceive that the objects of this association, whatever they may have been, were to be attained by criminal means. The means which they proposed to employ, as averred in this count, and which, as we are now to presume, were established by the proof, were that they should not work for a person, who, after due notice, should employ a journeyman not a member of their society. Supposing the object of the association to be laudable and lawful, or at least not unlawful, are these means criminal? The case supposes that these persons are not bound by contract, but free to work for whom they please, or not to work, if they so prefer. In this state of things, we can not perceive, that it is criminal for men to agree together to exercise their own acknowledged rights, in such a manner as best to subserve their own interests. One way to test this is, to consider the effect of such an agreement, where the object of the association is acknowledged on all hands to be a laudable one. Suppose a class of workmen, impressed with the manifold evils of intemperance, should agree with each other not to work in a shop in which ardent spirit was furnished, or not to work in a shop with any one who used it, or not to work for an employer who should, after notice, employ a journeyman who habitually used it. The consequences might be the same. A workman who should still persist in the use of ardent spirit, would find it more difficult to get employment; a master employing such an one might, at times, experience inconvenience in his work, in losing the services of a skillful but intemperate workman. Still it seems to us, that as

the object would be lawful and the means not unlawful, such an agreement could not be pronounced a criminal conspiracy."

Right in this connection, but really as a digression, I desire to say a word as to "boycotting." In the city of Chicago there seems to be no restriction by state law or city ordinance as to the location of saloons or places where intoxicating liquors are sold, except in certain limited regions known as prohibition districts. Any person of good moral character paying license and other fees can secure the right to conduct a saloon outside these very few districts anywhere in the city where he can buy or rent premises for that purpose.

There are many short streets in the city running down to the lake occupied solely by residences, there being even no apartment or flat buildings on them. Suppose in such a quiet neighborhood street some one buys a lot and then locates a saloon there. Would it be unlawful for the residents in that neighborhood to conspire to drive him out of it by quietly and peaceably agreeing not to patronize him and to urge all their friends, acquaintances and the public generally not to do so, thus combining to injure this person and to destroy his business? I suggest this merely in view of the observations of the chief justice as a sort of test of the soundness of those principles on which "boycotting," so-called, is condemned. It will not do to say such conduct is lawful when aimed at a man carrying on an unpopular though lawful business and unlawful when directed against some one in another line of business.

For most wrongs the law affords no sort of adequate remedy. Where one such is redressed or prevented by law a thousand are corrected by the spontaneous activities of society. The police

power has, and should have, nothing to do with them. The law can not take cognizance of them. An intelligent, alert and self-dependent people can correct most of the things in the way of trade combinations of which so much complaint is now made without the aid of the law or they can not correct them at all.

In the concrete case put, I submit that it would be impossible to justify a charge of criminal conspiracy. The person at whom it was aimed had exercised his legal rights; this must be permitted to him; and those of his fellows whose interests his enterprise imperiled and whose feelings were outraged by his conduct, although he had done them no legal wrong, must be permitted the like free exercise of their lawful right to injure and destroy this perfectly lawful business so long as in their effort to do so they employ no unlawful means. And so Chief Justice Shaw proceeds:

"We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another; that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair, or honorable and lawful means, it is, to say the least, innocent; if by falsehood or force, it may be stamped with the character of conspiracy. It follows as a necessary consequence, that if criminal and indictable, it is so by reason of the criminal means intended to be employed for its accomplishment; and as a further legal consequence, that as the criminality will depend on the means, those means must be stated in the indictment." Ib. p. 134.

In this case it will not do to say that the combination or concert alleged was to injure the Journal and therefore it is illegal.

The term "injure" is ambiguous; in its technical sense it imports unlawful injury: and therefore to say a conspiracy to injure is unlawful, is simply to say what no one disputes, that a conspiracy to do an illegal act is unlawful. It is necessary to ascertain, if the observations of Chief Justice Shaw be regarded, first, the purpose of the association; and, second, the means to be employed to effect it.

The purpose of the combination charged here was to induce advertisers not to patronize the Journal. Now whether such a combination is legal or not, inasmuch as such a purpose is not illegal, if sought by lawful measures, depends on the means to be employed. Within the rule laid down by practically all the cases, the means alleged in the information were entirely lawful. Those charged simply advised the advertising public that whoever saw fit to avail themselves of the Journal's facilities should be admitted to the columns of the other papers only on the terms stated. This was simply for the accused to say if an advertiser employed the Journal they would not work for him except on the conditions suggested. This was not boycotting the Journal. It had none of the elements relied on in *Quinn* v. *Leathem*, or the case from Virginia hereafter referred to. It was simply the exercise of a lawful right, which is expressly affirmed in nearly every case where this subject is discussed at any length.

In another leading case in Massachusetts discussing the legality of an association between certain persons keeping sailors' boarding houses by which they bound themselves to use their best efforts to prevent their boarders from shipping in any vessel when any of the crew were shipped from boarding houses not in good standing with the association; and also not to ship seamen

for less than certain specified wages; the Supreme Court of that state said:

"We can see nothing criminal in any of these stipulations; see *Commonwealth* v. *Hunt*, 4 Met. 111; and nothing illegal. If their effect is to destroy the business of shipping-masters who are not members of the association, it is such a result as in the competition of business often follows from a course of proceeding that the law permits. New inventions and new methods of transacting business often destroy the business of those who adhere to old methods; sometimes associations break down the business of individuals and sometimes an individual is able to destroy the business of associated men. It would be nothing novel if the plaintiff in the exercise of his ingenuity should in his turn adopt some improvement that shall compel the defendants to dissolve their connection.

Bowen v. *Matheson*, 14 Allen, 499.

In another case in the same court it was held that a conspiracy to obtain from a master mechanic money, which he was under no legal obligation to pay, by inducing his workmen to leave him and by interfering with others to prevent them from entering his employment, or by threatening to do this, so that he was induced to pay the money demanded, under a reasonable apprehension that he could not carry on his business without yielding to the demand was unlawful.

Carew v. *Rutherford*, 106 Mass. 1.

Chief Justice Chapman in that case, while holding as indicated, which is perhaps at least a doubtful ruling on the authorities, said, among other things:

"This principle does not interfere with the freedom of business but protects it. Every man has a right to determine what branch of business he will pursue and to make his own contracts with whom he pleases and on the best terms he can. He may

change from one occupation to another and pursue as many different occupations as he pleases, and competition in business is lawful. He may refuse to deal with any man or class of men, and it is no crime *for any number of persons*, without unlawful object in view, *to associate themselves together and agree that they will not work for or deal with certain men or classes of men*, or work under a certain price or under certain conditions."

And again, after referring to some early statutes interfering with this liberty of which he had spoken, the learned judge says:

"But experience and increasing intelligence led to the abolition of all such restriction and to the establishment of freedom for all branches of labor and business, and all persons who have been born and educated here and are obliged to begin life without property, know that freedom to choose their own occupation and to make their own contracts not only elevates their condition but secures to skill, industry and economy their appropriate advantages. Freedom is the policy of this country."

If that decision is to be criticised at all it seems as if the learned chief justice had misapprehended the relative importance of freedom from governmental restraint and freedom from possible malicious disturbance and annoyance in carrying on business.

In another case a declaration alleged that plaintiff's copartner and another conspired to compel him to withdraw from the firm and to dispose of his interest in it to them; and to that end, by false and malicious representations and other unlawful inducements offered to various creditors of the firm, procured creditors to attach all the property of the firm and to petition the officer serving the writ to sell forthwith, etc., whereby plaintiff was forced to withdraw from the firm.

Gray, C. J., said:

"The allegations of conspiracy, illegality, falsehood and

malice will not support this action, unless either the purpose intended, or the means by which it was to be accomplished, is shown to be unlawful (citing cases). No such unlawfulness appears upon the face of this declaration. The purpose of compelling the plaintiff to withdraw from the firm was not in itself unlawful; and the means are not shown to be unlawful, for the plaintiff's creditors, upon the allegations in the declaration, had a lawful right to attach his property and to petition the officers to sell the goods attached. The declaration, therefore, shows no cause of action.

O'Callaghan v. *Cronan*, 121 Mass. 114, cited and followed in *Groustra* v. *Burges*, 141 Mass. 7–9.

Morton, C. J., there said:

"The plaintiff can not maintain this action against the defendant for advising and procuring Hallett to assert and enforce his legal rights, even if the defendant was actuated by malice, because the plaintiff's rights are not invaded, and he sustains no legal injury."

In *Vegelahn* v. *Guntner*, 167 Mass. 92, it was held that an injunction would issue against the maintenance in front of complainant's place of business of a patrol to prevent carrying on his business until he should adopt a certain scale of prices to be paid to his employes.

The extent that this case goes is to hold, in the language of the court:

"But a combination to do injurious acts expressly directed to another by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him, is outside of allowable competition and is unlawful."

Two members of that court dissented from the judgment, Justice Holmes at some length; but the difference between the majority and the minority of the court seems to be somewhat on

the facts of the case; for the chief justice seemed to doubt whether there was any actual intimidation and if there were, thought that an injunction was not the proper remedy; while Justice Holmes said that he thought that two men walking together up and down a sidewalk and speaking to those who entered a certain shop did not necessarily amount to a threat of force; and he indicated very clearly the right under the doctrine of free competition of inflicting intentional injury or damage upon the business of a competitor. This case is also reported in 57 Am. St. Rep. 442.

One of the most recent cases in Massachusetts is *Plant* v. *Woods*, 176 Mass. 492. In the opinion of Justice Hammond and the dissent of Chief Justice Holmes all the leading Massachusetts cases and some others were discussed.

This was a bill to enjoin a labor union from conduct tending to prevent the members of plaintiff, another union, from obtaining employment. Defendant sent emissaries to shops where members of plaintiff's union were working and, as the court held, sought to coerce them to abandon that union and join the defendant's association.

The court repudiated *Allen* v. *Flood*, and insisted on the distinction between acts of the same character done from a malicious or from a justifiable motive. The court held (p. 496) that the defendant's threats imported violence, and that they would resort to vile and opprobrious epithets and intimidation.

But all that is here contended for was recognized as true in a general sense (pp. 498–9). *Bowen* v. *Matheson*, *Bohn Mfg. Co.* v. *Hollis* and *Macauley* v. *Tierney* are all cited with apparent approval.

The chief justice agreed with his associates except that he found justification for the defendants in their motive to strengthen the union while the other members of the court held that this possible advantage was too remote to "bring the acts of the defendants under the shelter of the principles of trade competition." p. 502.

It can not be said that any of these cases require condemnation of the conduct of plaintiff in error as illegal or criminal. The most that can be said is that in some of the later cases under the stress of apparent necessity and where a large number were engaged in the combination claimed to be illegal, so as thus to give "weight and cause danger," the court has shown some disposition to depart from the fundamental principles laid down by Chief Justice Shaw and followed in the earlier cases. As already indicated, where a thousand men combine to do each the same thing, the thing concerted is not the same as where one or two or three do or plan to do it. Therefore in a sense the object of the concert may be different, depending on the number combining. Three men or a dozen men agreeing not to deal with another where the effect of loss of their custom is but little may perhaps be said to combine to injure, but not to ruin him at whom their effort is aimed. But if the members of an entire community should for the purpose of ruining a man, thus combine, having the power to accomplish this purpose it is perhaps plausible to say that in scrutinizing such a combination, a court would be justified in taking the number engaged in it and their power to accomplish their purpose, into consideration in determining the nature and object of the conspiracy, as well as of the means contemplated in its execution. Possibly something like this explains

the general tendency of the more recent Massachusetts cases. To me, the views of Mr. Justice Holmes while on that bench naturally appeal strongly; and, eliminating all threats of unlawful interference, tumult, violence and intimidation, open or covert, the necessity of extending the doctrines of criminal conspiracy is not apparent.

I turn now to the decisions in New York; and in view of the fact that the Court of Appeals has recently gone over this subject with great care I shall refer only to that decision and to two others both in courts inferior to that tribunal.

Chief Justice Daly, of the New York Common Pleas, wrote an interesting opinion in a case where a corporation sued one of its members; it was an association of master stevedores, and had adopted a by-law fixing certain prices for work, and providing that if any member should be found guilty of working for any less, he should forfeit the penalty, which might be collected in the name of the corporation; suit was brought for such penalty; there was a demurrer to the complaint; the court overruled the demurrer and sustained a recovery. 2 Daly, 1.

The case contains an interesting review of the authorities, and some sound and philosophical observations upon the general subject of combinations of workingmen. It is doubtful, however, whether the opinion is entirely consistent with the recent case of *National Protective Association* v. *Cumming*, 170 New York, 315.

The Philadelphia Boot & Shoemaker's case is referred to in this opinion, and also the case of the Journeymen Cordwainers of New York, reported in 1 Select Cases of New York, Isaac Riley, publisher, N. Y., 1811. This case is chiefly noteworthy for the learned and suggestive argument submitted by Mr. Sampson for

the defendants which, after the lapse of nearly a hundred years, is still interesting and pertinent. However, Mr. Sampson was formidably opposed by Thomas Addis Emmet, among others, and lost his case. Both were distinguished Irishmen, the latter the brother of Robert Emmet. The case is of no authority, and I do not pause to discuss it.

In considering the stevedores' case involving the validity of combinations of manual laborers, some regard must be paid to the ancient law of England on the subject, both statute and common law, and to the effect which the prevailing notions of an early age, though long since abandoned, have had in shaping the course of adjudication, as is well suggested by Chief Judge Parker in the case cited.

Indeed, notwithstanding the great respect due to the learned utterances of Chief Justice Daly, it is quite doubtful whether he is entirely accurate in his statement that at common law it was not unlawful and criminal for journeymen or laborers to combine to raise their wages. If these questions were at all material in this age of enlightenment, a careful examination of English precedents might be necessary. It is sufficient now to say that in Mr. Chitty's excellent and accurate work on criminal law, Vol. 3, page 1163, is found a precedent for an indictment at common law for a conspiracy among workmen to raise their wages and lessen the time of labor. This indictment does not conclude *contra formam statuti*, but against the peace, etc.; and in a note the author refers to other common law works on practice for similar precedents, among others, against journeymen lamp-lighters for conspiring to raise wages and against journeymen for conspiring to raise wages contrary to the order of justices and adds, "By

concluding the above precedent contrary to the form of the statute it will be good under 2 and 3 Edward 6, page 15, section 1."

It is interesting to note that one of the charges in this indictment is that the defendants did then and there

" unjustly and corruptly conspire, combine, confederate and agree among themselves that none of the said conspirators * * * would work day work or labor any longer than from the hour of six in the morning till the hour of seven in the evening in each day from henceforth, to the great damage and oppression of their masters,etc., and also divers others of his Majesty's subjects."

It is well to contemplate, as we listen to eulogy and panegyric of the common law of England, the spirit of a time which could tolerate either a statute or a rule of law, judicially promulgated, which should make it an indictable offense for any earning their living by hard and exacting manual labor to seek to reduce the hours of daily labor so that they should not be compelled to work from six in the morning until seven in the evening; and possibly when the decisions upon some similar questions promulgated in the present day and generation, come to be studied and calmly reviewed by the future legal historian they may not meet the full approval of a more enlightened and benign jurisprudence. For it is the crowning glory of the common law that it keeps pace with the progress of civilization and the spirit of the age. It is never to be regarded as a system of fixed rules unalterably prescribed and incapable of modification and development. It follows and adapts itself to the customs of the people. It reflects, therefore, the faults of the age. These become in a measure embalmed in judicial decision and thus secure a kind of immortality which tends sometimes to pro-

ject itself into and somewhat fetter another age and time. But this does not warrant though it may in a measure explain the criticism of Beccaria quoted by Sampson that the judicial system of every country is two or three hundred years behind its progress in civilization.

In *People* v. *Wilzig*, 4 N. Y. Co. Rep. 403, there is an extended discussion of "boycotting" in the course of which the court reaches the conclusion that if there is absolutely no intimidation it is not unlawful; but that neither acts of violence nor threats are necessary to constitute intimidation. The attitude of those congregating in front of another's place of business may be one of menace. In the course of his charge to the jury in this case Judge Barrett employed this language:

"You have heard some of the witnesses to-day talk in a very discreet and reasonable way on this subject. They told us that when grievously oppressed by an employer they felt that they had a right to go to their friends and solicit condemnation of the oppressor in some practicable form; well, so they have. They have a right to go to all their friends, make known their wrongs, and say to them, 'If you are a friend of labor, withdraw your patronage from the man who injures us or refuses us justice.' There is no law against that." p. 413.

This is not this case; for those accused here did not say to others withdraw your patronage from our rival; but rather that they would, in dealing with their patrons, give better terms to those who did not deal with their rival than to those who did.

I have cited this case, however, as a part of the history of decision in this country and because the view taken by the court seems to be so just and reasonable. Like many other cases cited in this brief from reports of decisions by courts of original jurisdiction, the case can hardly be regarded as one of authority.

The recent case in the Court of Appeals, just referred to, contains an extended discussion upon the subject of trade conspiracies. It there appeared that a labor union refused to permit its members to work as fellow-servants with members of a rival organization and notified the employer to that effect and that a strike would be ordered unless the members of the rival organization were discharged. Such notice having been given, a member of the rival association was discharged and he and the association brought suit against the officers of the association giving such notice, to enjoin the defendants from preventing the employment of the association or its members, etc. It was held that the bill would not lie.

National Protective Association v. *Cumming*, 170 New York, 315.

In the course of the opinion of the court, Parker, Chief Judge, said:

"Stated in other words, the propositions quoted recognize the right of one man to refuse to work for another on any ground that he may regard as sufficient and the employer has no right to demand a reason for it. But there is, I take it, no legal objection to the employe's giving a reason, if he has one, and the fact that the reason given is, that he refuses to work with another, who is not a member of his organization, whether stated to his employer or not, does not affect his right to stop work, nor does it give a cause of action to the workman to whom he objects, because the employer sees fit to discharge the man objected to rather than lose the services of the objector.

The same rule applies to a body of men, who having organized for purposes deemed beneficial to themselves, refuse to work. Their reasons may seem inadequate to others, but if it seems to be in their interest, as members of an organization, to refuse longer to work, it is their legal right to stop.

The reason may no more be demanded as a right of the organization than of an individual, but if they elect to state the reason, their right to stop work is not cut off because the reason seems inadequate or selfish to the employer, or to organized society."

And again,

"I know it is said in another opinion in this case that 'workmen can not dictate to their employers how they shall carry on their business, nor whom they shall or shall not employ;' but I dissent absolutely from that proposition and assert that so long as workmen must assume all the risk of injury that may come to them through the carelessness of the co-employes, they have the moral and legal right to say that they will not work with certain men and the employer must accept their dictation or go without their services."

Again,

"It seems to me, illogical and little short of absurd to say that the every-day acts of the business world apparently within the domain of competition may either be lawful or unlawful, according to the motive of the actor. If the motive be good, the act is lawful; if it be bad, the act is unlawful. Within all the authorities upholding the principle of competition, if the motive be to destroy another's business in order to secure business for yourself, the motive is good, but according to a few recent authorities, if you do not need the business, or do not wish it, then the motive is bad."

The court further says (page 328) that if the motive of such conduct be to secure business for the person charged with it, such a purpose is not illegal within the rules laid down in the dissenting opinion in that case, nor under the authorities cited therein, and that it is only where the sole purpose is to do injury to another or the act is prompted by malice, that it is insisted that the act becomes illegal.

The learned judge further said:

"A man has a right under the law to start a store and to sell at such reduced prices that he is able in a short time to drive the storekeepers in his vicinity out of business, when, having possession of the trade, he finds himself soon able to recover the loss sustained while ruining the others. Such has been the law for centuries. The reason, of course, is that the doctrine has generally been accepted that free competition is worth more to society than it costs and that on this ground the infliction of damages is privileged.

Commonwealth v. *Hunt*, 4 Met. 111–134.

Nor could this store-keeper be prevented from carrying out his scheme, because instead of hiding his purpose, he openly declared to those store-keepers that he intended to drive them out of business in order that he might later profit thereby. Nor would it avail such store-keepers, in the event of their bringing an action to restrain him from accomplishing their ruin by under-selling them, to persuade the trial court to characterize the notification as a 'threat,' for on review, the answer would be: A man may threaten to do that which the law says he may do, provided that within the rules laid down in those cases, his motive is to help himself.

A labor organization is endowed with precisely the same legal right as is the individual, to threaten to do that which it may lawfully do."

The court proceeds to discuss somewhat the course of legislation in England, prefacing it with this suggestion:

"I have refrained from discussing the authorities because it seemed unnecessary for the reason already stated in this opinion, but it seems not out of place to suggest that the decisions of the English courts upon questions affecting the rights of workmen ought at least to be received with caution, in view of the fact that the later ones are largely supported by early precedents which were entirely consistent with the policy of the statute law of England, but are hostile not only to the statute law of this country, but to the spirit of our institutions."

Judge Gray wrote a concurring opinion in which he said:

"Our laws recognize the absolute freedom of the individual to work for whom he chooses, with whom he chooses and to make any contract upon the subject that he chooses. There is the same freedom to organize in an association with others of his craft to further their common interests as workingmen, with respect to their wages, to their hours of labor or to matters affecting their health or safety.

They are free to secure the furtherance of their common interests in every way which is not within the prohibition of some statute, or which does not involve the commission of illegal acts.

The struggle on the part of individuals to prefer themselves and to prevent the work which they are fitted to do from being given to others, may be keen and may have unhappy results in individual cases; but the law is not concerned with such results, when not caused by illegal means or acts."

Probably this case is in direct conflict with *Plant* v. *Woods*, recently decided by the Supreme Court of Massachusetts. There was dissent of a number of judges; and yet the doctrine of this case seems so friendly to the fundamental idea of individual and personal liberty, that I hope it may generally be accepted as the law of this country. There is an undertone running through cases maintaining other doctrine that seems to indicate that the courts are influenced by a desire to act on general impressions as to the facts of a particular case, rather than to proceed strictly on the record before them. Some of the language employed in *Plant* v. *Woods* appears to indicate an opinion that all strikes may be enjoined, because such interruptions of labor are usually, as is possibly the fact, attended with violence and intimidation.

Conspiracy is, after all, a kind of constructive crime in many instances, where, by presumptive inference and artificial reasoning, an effort is manifest to reach those whose proved connection

with any illegal conduct is so slight as not to warrant conviction. In labor cases the attitude of union men and strikers no doubt furnishes some justification for this; yet I can but think that harshness and rigor from the bench and strained interpretations of the law to reach desired results aggravate rather than relieve such a situation.

It was, I believe, Macaulay who said that "the true secret of the power of agitators is the obstinacy of rulers;" and Sir Charles Napier, a great soldier, who did not lack in courage and vigor of mind says:

"As to government, all discontent springs from unjust treatments. Idiots talk of agitators; there is but one in existence and that is injustice."

Turning to the decisions of this court there do not seem to be any particularly material on this branch of the case except possibly those arising under the anti-trust act of 1890, to which reference is hereafter made.

There is no common law offense of conspiracy against the United States; and, by statute it is restricted to combinations to do certain indicated illegal acts or to defraud the United States or to violate a law thereof.

U. S. v. *Britton*, 108 U. S. 199.

Pettibone v. *U. S.*, 148 U. S. 197

I do not attempt to discuss all the cases arising at the circuit out of the railroad strikes of 1894; most of them are based on the anti-trust act, in some the rights of receivers were in question and in none were questions involved in this record fairly before the courts. I must, however, particularly refer to *Arthur* v. *Oakes*, 63 Fed. 310–329.

In that case an able and discriminating circuit judge, doubtless much impressed by the evils threatened to a great railroad property in the custody of his court, had ruled, as quoted by the Supreme Court of Wisconsin, that the employes of his receivers could not exercise their lawful right to quit work in combination because their conduct was tainted with an unlawful purpose, to-wit, the purpose of crippling the operation of the road. Mr. Justice Harlan, sitting in the Court of Appeals, corrected this error, and in the case cited said:

"These employes having taken service first with the company, and afterwards with the receivers, under a general contract of employment, which did not limit the exercise of the right to quit the service, their peaceable co-operation as the result of friendly argument, persuasion or conference among themselves, in asserting the right of each and all to refuse further service under a schedule of reduced wages, would not have been illegal or criminal, although they may have so acted in the *firm belief and expectation* that a simultaneous quitting without notice *would temporarily inconvenience the receivers and the public.* If, in good faith and peaceably, they exercise their right of quitting the service, intending thereby only to better their condition by securing such wages as they deem just, but not to injure or interfere with the free action of others, they can not be legally charged *with any loss* to the trust property resulting from their cessation of work in consequence of the refusal of the receivers to accede to the terms upon which they were willing to remain in the service. Such a loss, under the circumstances stated, would be incidental to the situation, and could not be attributed to employes exercising lawful rights in orderly ways, or to the receivers, when, in good faith and in fidelity to their trust, they declare a reduction of wages, and thereby cause dissatisfaction among the employes, and their withdrawal from service. * * *

What we have said about illegal combinations has no reference to such associations, but only to combinations *formed with*

the intent to employ force, intimidation, threats or other wrongful methods, whereby the public will be injured, or whereby will be impaired the absolute right of individuals, whether belonging to such combinations or not, to dispose of their labor or property upon such terms as to them seem best."

Arthur v. *Oakes*, 63 Fed. Rep. 310–329.

In other words, the conduct of the strikers, if lawful, might involve and be intended to involve loss; but this is not injury; it is, on the other hand, *damnum absque injuria*. This case seems to be quite inconsistent with the views of the court below; a proposition which is fortified by the fact already referred to, that the learned justice writing the opinion quotes the language of the Circuit Court on the very point just stated, and on which the Court of Appeals differed with the court of first resort.

Another important case in this connection, not because it decided the question here involved as in that case there was no statute in question, but because it reviewed at some length and with much discrimination many of the cases decided on this general branch of the law, some of which are cited in this brief, is *Continental Insurance Co.* v. *Board of Underwriters*, 67 Fed. 310, decided by Mr. Justice McKenna, then circuit judge.

It appeared that certain underwriters formed an association under an agreement providing for the regulation of premium rates, the prevention of rebates, the compensation of agents and non-intercourse with companies not members. It was held that this was not an illegal conspiracy and that the accomplishment of its purpose by lawful means would not be enjoined at the instance of an insurance company not a member; and it was also held that the dismissal of an agent by one of the association com-

panies for refusal to represent such company exclusively and refusal to place insurance for outside companies, were lawful means to accomplish the purpose of the association.

In the course of the opinion it was said:

"It was admitted at the oral argument that some of the acts of the defendant company were lawful of themselves. For instance, it was admitted that it was competent and lawful for a board company to choose to be served or not to be served by an agent who was also agent of the plaintiff; that it was competent and lawful for it to accept or refuse re-insurance from the plaintiff or its customers, or anybody, or join or not join in insurance with either.

These it was conceded were business privileges which might have various and justifiable methods, but it was contended that the combination being unlawful, these acts lost their privileges and became unlawful too. This makes the first, if not the principal, inquiry the character of the combination. Was it unlawful?

To put it more narrowly and hence more precisely, for our purpose, was it so far illegal that the plaintiff may complain of it and enjoin it or its acts without regard to the quality of the latter?"

This the court decided in the negative.

It is true this was a civil case, like the case of the Mogul Steamship Company, much relied upon in that case; and the question was not, therefore, whether the combination was so far criminal as to be the subject of indictment, but was the question stated in the language just quoted; and certainly much less was there involved in that case, any question as to the constitutionality of a statute aimed at such combination.

Both of these cases are highly favorable to the contention urged for plaintiff in error, and go far to demonstrate that he is not guilty of any unlawful conspiracy unless by statute.

Another federal case was decided by the Court of Appeals for the Sixth Circuit. In it Judge Thayer said:

"It has been well observed that it would be dangerous to the peace of society to admit the doctrine that any lawful act can be transformed *prima facie* into an actionable wrong by a simple allegation that the act was inspired by malice, or ill-will, or by an improper motive. It is wiser, therefore, to exclude any inquiry into the motives of men when their actions are lawful, except in those cases where it is well established that malice is an essential ingredient of the cause of action, or in those cases where, the act done being wrongful, proof of a bad motive will serve to exaggerate the damages.

The case at bar falls within neither of the exceptions to the general rule above stated—that, if an act is done in the exercise of an undoubted right, and is lawful, the motive of the actor is immaterial. No one can dispute the right of the defendant company to offer for sale goods that it owned and were in its possession, whether the quantity was great or small, for such a price as it deemed proper. This was the outward visible act of which complaint is made, and being lawful, the law will not hold it to be otherwise because of a secret purpose entertained by the defendant company to inflict loss on the plaintiff by compelling it to reduce the cost of a certain kind of its prints or calicoes.

Nor is the complaint aided in any respect by reference to the law of conspiracy, since the only object that the defendants had in view *which the law will consider* was the disposition or sale of certain goods which the defendant corporation had the right to sell; and the means employed to accomplish that end, namely, placing them on the market at a reduced cost, were also lawful."

Possaic Print Works v. *Ely & Walker Co.*, 105 Fed. 163, 166-7.

A few other recent cases may be noted which possibly may seem to be inconsistent to some extent with the cases already

cited, such as the recent decision of the New York Court of Appeals.

Jackson v. *Stanfield*, 137 Ind. 592–621, expressly disapproves *Bohn Mfg. Co.* v. *Hollis*, 54 Minn. 223, and rules the contrary on similar facts.

The opinion is long and makes rather an indiscriminate citation and use of cases. It does not seem to require extended comment.

In a recent case in Michigan "boycotting is held illegal and there is some discussion of labor combinations and "picketing."

Beck v. *Ry. Union, etc.*, 118 Mich. 497;

S. C., 74 Am. St. 421.

In a Vermont case it is decided that if two or more persons combine to drive, by violence or intimidation, an employer from retaining or employing certain persons, or an employe from entering his service, this is a criminal conspiracy at common law.

State v. *Stewart*, 59 Vt. 273;

S. C., 59 Am. Rep. 710.

With this proposition there can be no quarrel, although the court in its opinion says a great deal that would seem to be entirely inconsistent with any just notions of the degree of individual liberty secured by constitutional provisions.

It appears that in this case the indictment charged the defendants with an intent to prevent the prosecution of the work of the Ryegate Granite Works by threatening certain of their workmen; by declaring the works "scab" shops, their workmen "scabs," that their names would be published in the "scab's" list in the Granite Cutter's Journal, and that they

would be shunned and not allowed to work with other granite cutters, and would be disgraced in the craft, etc., by all which O'Rourke, Goodfellow and others were frightened and driven away from the shops.

It would seem as if this was clearly an unlawful conspiracy within the definitions of Chief Justice Shaw in *Com.* v. *Hunt.*

A different question would be presented in this case if the plaintiff in error were charged with a purpose to prevent the publication of the Journal by similar means. The decision is no authority in favor of the judgment below.

In a case in Virginia it was ruled that where two or more persons conspire by their intimidation or molestation to deter or influence another in the matter of whom he should employ, his industry, his capital, etc., they are guilty of an offense. *Crump* v. *Commonwealth*, 84 Va. 927; S. C. 10 Am. St. Rep. 895.

If the terms intimidation or molestation were rightly understood, it would not be possible to criticise this decision; but it appears that the court sustained the indictment and conviction in that case upon the ground that it charged a conspiracy to break up and destroy the business of a certain firm, without stating or alleging the employment of any unlawful means to this end.

This decision is plainly inconsistent with *Bowen* v. *Matheson*, and many other cases and is obviously unsound in principle.

It is based on the early English cases, which, as has been well pointed out by Chief Judge Parker in the recent New York case cited, "are not a safe guide in this domain of the law." It is to be discriminated from the case before the court in two im-

portant particulars. It was a boycott on an extensive scale carried on by the members of a typographical union in connection with the Knights of Labor, with which that union was affiliated. Its object was apparently to absolutely destroy the trade of the firm in question, not only throughout the State of Virginia, but elsewhere. There seems to be a kind of suggestion running through the opinion that this was to be done by means of a species of intimidation; but whether so or not, the conspiracy alleged was of a wholly different nature and of a vastly greater magnitude than the combination asserted in the information in this case; and again, the object charged in the indictment was a conspiracy to injure, ruin, break up and destroy the business of the firm in question, not by competition at all, but by a species of coercion and intimidation; whereas, as is perfectly apparent from the information in this case, the object of the combination here was merely to injure the Journal Company in its trade and business and the means to be employed were such as are actually employed in all competitive commercial effort. The principle quoted and contained in the syllabus is unnecessary to the decision in that case, for there is a practical distinction to be taken between a combination of two or a small number in the way of trade and competition thus to injure another and a combination which by its very magnitude tends to riot, disorder and breach of the peace and is almost inevitably accompanied by intimidation, either open or covert, and a kind of terrorization of those who would otherwise trade and do business with the persons conspired against.

In this case it was proved in the language of the court that "minions of the boycott committee dogged the firm in all their

transactions, followed their delivery wagons, secured the names of their patrons, and used every means short of actual physical force, to compel all persons to cease dealing with the firm."

If it be true, however, that in this case there was no intimidation or unlawful conduct or riotous congregation of the conspirators and their confederates; in other words, if there was only such a combination to take away trade from the complainant firm, as the court declared to be admissible in *People* v. *Wilzig*, decided by Judge Barrett in New York, then it would appear that this case is not sustained by sound principle.

A case which proceeds somewhat upon the general theories laid down in the Virginia case, and to which the same comment is applicable, although it was a civil and not a criminal proceeding, is found in Maryland. *Lucke* v. *Clothing Cutters, etc., Assembly*, 77 Md. 396; s. c., 39 Am. St. 421.

This was an effort by the union to procure the discharge of a non-union man in the employ of a firm in Baltimore, with the threat that all labor organizations in the city would otherwise be notified that the house was a non-union house. The union in that case, however, was incorporated under the laws of Maryland.

There is a case decided by the Circuit Court of the United States for the Southern District of Ohio which holds that a combination by a trades union to boycott a newspaper for refusing to unionize its office is illegal, unlawful and should be enjoined by a court of equity.

However, that case enjoins a boycott on the theory that this is, in popular apprehension, an organized effort to exclude a person from business relations with others by persuasion, intimida-

tion and other acts which tend to violence and thereby coerce him, by fear of personal injury, to submit to dictation in the management of his affairs. There runs through the entire opinion in that case the idea that the combination sought to be enjoined, came under this category. It is on its facts a case quite different from that before the court.

In a Texas case, a suit for damages, where plaintiff, a dealer, charged that defendants refused to sell him goods maliciously, and induced a third person to do so, it was held on demurrer that the petition was good.

Delz v. *Winfree et al.*, 80 Tex. 400.

The court said, p. 404:

"The appellee also asserts the following proposition, which may be conceded to be correct: 'A person has an absolute right to refuse to have business relations with any person whomsoever, whether the refusal is based upon reason or is the result of whim, caprice, prejudice or malice, and there is no law which forces a man to part with his title to his property.'

The privilege here asserted must be limited, however, to the individual action of the party who asserts the right. It is not equally true that one person may, from such motives, influence another person to do the same thing. If without such motive the cause of one person's interference with the property or privileges of another is *to serve some legitimate right or interest of his own*, he may do acts himself or cause other persons to do them, that injuriously affect a third party, so long as no definite legal right of such third party is violated."

Citing and quoting at length from *Walker* v. *Cronin*, 107 Mass. 562.

This case, in so far as it regards motive as important, and indeed controlling, may be said to sustain the judgment below.

But with deference it is thought that the court below fell into error in imputing merely wanton and malicious motive to plaintiff in error.

A case which will no doubt be cited if noticed by counsel for the state is *Brown* v. *Jacobs Pharmacy Co.*, 41 So. Eastern Rep. 553 (Ga.).

The fact most apparent to the casual reader of this opinion is the frequent reference to the work of Mr. Arthur J. Eddy of the Chicago Bar on Combinations, Trusts, etc.

The writer ingenuously remarks, referring to a Massachusetts case on which I rely, that it has been "criticised by Mr. Eddy, whose book shows that he approached the subject without any prejudice against combinations." Inasmuch as this brilliant and versatile gentleman has organized and promoted several of the largest combinations in the country, his attitude may be regarded as not necessarily hostile.

But to say that *Bowen* v. *Matheson* is "not a well-considered case," on the authority of copious collocation from Mr. Eddy's work and statement of his opinion is not convincing.

The facts in that case are wholly dissimilar to those in this record; and while the court differs from some cases already cited and relied on as an authority it does not sustain the judgment below.

An extreme case is found in New Jersey.

Frank v. *Herold*, 52 Apl. 152.

Vice-Chancellor's Court. It does not seem worth while to examine minutely what seems to be the anomalous rule in that state; nor even to speculate how far the fact that this state is the

notorious breeding ground for predatory and fraudulent corporations and monopolies may color or affect its jurisprudence in the matter of labor difficulties. The case before the court is, however, entirely different from that case in its facts.

The law of criminal conspiracy, in relation to trade combinations, is summarized and the cases cited to some extent by Mr. Eddy in his work upon Combinations, Vol. 1, Sec. 341, *et seq.*; and if the court desires to trace the early history of the law in England upon this subject, it may be found examined with much apparent learning and original research in an article by Mr. Frank P Blair of Chicago, on "Judge-made Law of Conspiracy," 37 American Law Review, 33.

The work of Mr. Wright is familiar and instructive.

The argument of Mr. Sampson in the Cordwainers case is referred to elsewhere.

A total departure from sound principle absolutely destructive of that certainty which ought, upon every consideration of justice and expediency, to mark the criminal law, was made when it was held that a conspiracy to do that not criminal, but which is injurious or prejudicial to society or immoral, is indictable.

Such a principle once admitted of course the law on this topic is uncertain, as indeed it is on many others. But it is uncertain in a field wherein above all others certainty is essential. With what justice or propriety can society punish crimes which are never defined by the law until after their commission?

In a leading case on this subject this language is employed by Chief Justice Caton. (*Smith* v. *People*, 25 Ill. 9–13.)

"To attempt to define the limit or extent of the law of conspiracy, as deducible from the English decisions, would be

a difficult if not an impracticable task, and we shall not attempt it at the present time. We may safely assume that it is indictable to conspire to do an unlawful act by any means, and also that it is indictable to conspire to do any act by unlawful means. In the former case it is not necessary to set out the means used, while in the latter it is, as they must be shown to be unlawful. But the *great uncertainty*, if we may be allowed the expression, is as to what constitutes an unlawful end, to conspire to accomplish which, is indictable without regard to the means to be used in its accomplishment."

How absurd to punish when courts of the highest authority confess their inability to declare in advance any boundary whatever to this field of criminal law. Anything that to a court seems *contra bonos*, though not subject to criminal prosecution if actually done or committed by one, becomes, when agreed upon or concerted, though no step be taken toward its consummation, the subject of penal visitation.

The reasoning on which this principle is justified is entirely fallacious. The case just cited was one of conspiracy to seduce. The court said:

"If the laws of the land will not afford such protection then individuals will protect themselves by violence, for it is not in human nature to let such offenses go unpunished in some way."

The courts are in nowise responsible for the provisions of the penal code. Is the offense of conspiring to seduce a young and innocent female appreciably more heinous or atrocious than the offense of actual seduction? Is the unattempted plot more likely to invite violence than the accomplished wrong?

Yet the legislature has seen fit in the state where this case was decided, not to make seduction a crime. In many cases there is nothing that rouses a righteous indignation like this be-

trayal of innocence and virtue; and in extreme cases, in the forum of a public opinion by no means unenlightened, when the natural protector of the unfortunate victim exacts the life of her betrayer; he is not condemned—yet the offense he has thus avenged is, and when the court spoke was, no crime. If it ought to be, let the legislature and not the courts take the responsibility.

The principle on which these and identical rulings rest is most hostile to liberty. In these cases, that the object of the conspiracy is not only immoral but injurious to the social order, admits of no debate. Many classes of cases have arisen, however, where the object of the combination under investigation is so remotely related to private morality or the public welfare, that to pronounce it so far injurious as to be criminal, is simply to express a doubtful opinion on some economic or social question. To carry this principle to its logical conclusion would strongly tend to deprive men of all personal liberty. The evils which follow and attend upon the sale of intoxicating liquors can hardly be overstated. Shall brewers, owners and distillers interested in the manufacture and sale of their liquors be therefore amenable to a charge of criminal conspiracy, because they meet together to concert plans for attractive advertisement of their wares and other novel allurements, by which the sale of their product shall be increased? True, such sale may be permitted by law; but this furnishes no protection. If it is injurious to the public welfare there is ample authority, on principle, for their condign punishment. During the next year it will, no doubt, be clearly indicated by many capable and thoughtful men that the political party to which they are

opposed is seeking to compass the ruin of our country. If some judge be satisfied that the doctrines of his political opponents are thus destructive and pernicious, can he therefore convict and sentence those advocating them on a charge of criminal conspiracy to do that which is clearly against the public welfare?

Upon like principle the professors of an obnoxious religion, those who practice some unpopular method of healing, possibly the manufacturers of some, if not most, of the numerous breakfast and health foods which now excite the public expectation and impair individual digestion, may all be brought within the denunciation of this sweeping and compendious interdict against combining to do that which is injurious to society and hostile to the general welfare. That is precisely what is happening to-day in respect of the combinations of workmen; for it is those, unfortunately, with the least powers of resistance, upon whom the strong arm of the law descends most heavily.

What, then, is the argument? That this court should overturn the settled law of criminal conspiracy? By no means. Indeed, literally to do this is an impossibility; if for no other reason, because there is no "settled law" on the subject. It is not even proposed, in the language of the court below, to revise all our notions of the law of conspiracy and rewrite the books on this topic.

Let the law, so far as it is settled, stand; but let it remain settled, and not with ever-increasing sweep take in all the essential rights of personal liberty, freedom of thought, speech and action, singly or in combination, which have been supposed to be guaranteed by the constitution and frame of our government.

To conspire to seduce is criminal: so say the cases, and let it be so. But let us proceed no farther in a wrong direction. As to conspiracies generally to do that which is lawful, let them not be held to be criminal, unless, as in the instance referred to, this is settled law. If further progress in that direction is necessary let it be made by legislation and not by judicial construction.

Let the doctrines of Chief Justice Shaw, based on Lord Denman's definition of conspiracy, in all new cases be followed strictly; and then something will be done to rescue the law on this subject from that confusion worse confounded in which it is now almost hopelessly beclouded.

It is a fact to be noted that from the judgment of the Supreme Court of Illinois in the case just discussed that great judge, profound lawyer and steadfast friend of liberty, Sidney Breese, dissented.

I summarize this part of the argument as follows: The combination alleged against plaintiff in error and his associates was not criminal at common law, quite irrespective of the motive which animated it. But that motive was obviously self-interest. That it was not solely inspired by mere wanton malice the court below concedes. What that learned court intends by averring that there was some proof that the accused made the agreement to maliciously injure the Journal company in its business must be left to conjecture. For on the *habeas corpus* the sufficiency of the complaint was before the court. There was no evidence in that record.

In determining whether the parties charged were in the exercise of lawful rights to liberty, guaranteed by the Federal Constitution, there being questions of law only and none of fact

in this case, this court is not bound by the conclusion reached by the court below in this regard, but will examine the question independently; and, if of opinion that the motive is material and that the inference of self-interest, as a motive, is legitimate, then this court is entirely at liberty to draw such inference, quite irrespective of the conclusions of the Wisconsin court.

I shall now proceed to examine the nature of the right to liberty guaranteed by the Fourteenth Amendment, and shall endeavor to show that the right to do that with which the parties here accused stand charged is secured beyond State interference.

But I repeat again, if it be the subject of prohibition by the State, the further question remains, not what is the power of the State in this regard, but is the statute in question an admissible exercise of that power; and that question must be determined wholly irrespective of the facts in the information, on an inspection of the statute as construed by the court of last resort in the State where it was adopted.

II.

I premise this discussion with the statement of an important principle of constitutional law from a recent decision of this court:

"The question of constitutional law to which we have referred can not be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when

avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived."

Connolly v. *Union Sewer Pipe Co.*, 22 Sup. Ct. Rep. 431–438.

Numerous authorities can be cited on this subject. I have aimed to gather only the most recent and authoritative. As they cite and refer to the earlier decisions the court will be thus readily possessed of most, if not all, the cases on the subject.

In *State* v. *Goodwill*, 33 West Va. 179, it was held that a statute declaring that all persons engaged in mining coal or other minerals, or mining or manufacturing them, or manufacturing iron or steel, or any other kind of manufacturing, should not issue for the payment of labor, any order unless redeemable at its face value in lawful money of the United States, with legal interest payable to the employe and redeemable within thirty days, was unconstitutional and void. The court stated the question involved thus:

"Can the legislature, in view of those constitutional guaranties, limit or forbid the right of contract between parties under no mental, corporal or other disability, when the subject of the contract is lawful and the exercise of it is purely private and personal to the parties themselves?"

This question was decided in the negative.

The court considered somewhat the nature and extent of the police power, commenting upon the great case of *Munn* v. *Illinois*, decided in this court, 94 U. S. 113, and declaring that the reason for that decision was that the business carried on by

the persons there complaining of legislation was of a public nature. To this case, as reported in 25 Am. St. 863, is appended an extended note, citing many decisions on this question.

A statute of Pennsylvania, attempting to prohibit payment of employes in anything but cash, even by mutual consent, was held unconstitutional. (*Godcharles* v. *Wigeman*, 113 Penn. St. 431.)

The court said, page 437:

"The orders given by the defendants and received by the plaintiff, constituted a proper set-off. The first, second, third and fourth sections of the act of June 29th, 1881, are utterly unconstitutional, and void, inasmuch as by them an attempt has been made by the legislature to do what, in this country, can not be done; that is, prevent persons who are *sui juris* from making their own contracts."

It is true it has been decided in the same state that the business of insurance against loss by fire is of such magnitude and importance, and of such a nature, that it may be properly regulated under the exercise of the police power of the state, and such a regulation, by reason of this, will be sustained by the courts.

Commonwealth v. *Vrooman*, 164 Pa. St. 306; S. C., 44 Am. St. 603.

That, however, does not affect this case.

A statute forbidding an employer to impose a fine upon, or withhold wages from, an employe engaged in weaving, for any imperfection in the weaving, was held unconstitutional in Massachusetts though the Fourteenth Amendment to the Federal Constitution does not seem to have been considered.

Commonwealth v. *Perry*, 155 Mass. 117; S. C., 14 L. R. A. 325; Holmes, J., Dis.

In New York a statute prohibiting any person selling any article of food from offering to give or giving some other article as a gift or prize in connection with such sale, is held to be unconstitutional, as depriving a person of life, liberty or property without due process of law. *People* v. *Gillson*, 109 N. Y. 389; S. C., 4 Am. St. 465.

In the course of his opinion in that case, Judge Peckham stated these canons of constitutional law:

"A person living under our constitution has the right to adopt and follow such lawful industry or pursuit not injurious to the community as he may see fit. The term "Liberty" as used in the constitution is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of a man to be free in the enjoyment of the faculties with which he has been endowed by his creator, subject only to such restraint as is necessary for the common welfare.

Liberty, in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation * * *

It is quite clear that some or all of these fundamental and valuable rights are invaded, weakened, limited or destroyed by the legislation under consideration. It is evidently of that kind which has been so frequent of late; a kind which is meant to protect some class in the community against the fair, free and full competition of some other class, the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislators to secure some enactment which will operate favorably to them, or unfavorably to their competitors in the commercial, agricultural, manufacturing or producing fields."

Discussing then the question as to whether the act under ex-

amination was valid as a proper exercise of the power of the police, the court remarked that this power was not above the constitution, but limited by its provisions and that the legislature could not without reason and arbitrarily infringe upon the liberty or property rights of any person within the protection of the constitution, and that its exercise of power in this regard was subject to the scrutiny of the courts; and that upon such examination, courts must be able to see that there was some fair, just and reasonable connection between the legislation in question and the public health, comfort or safety. The court also recognized the power of the legislature to declare what conduct should be criminal but remarked that there was a limit even to that power under the constitution.

A very full and exhaustive discussion of a constitutional question somewhat similar to that presented in this record is found in the case of *Leep* v. *Railway Company*, 58 Ark. 407, reported also in 41 American State Reports, 109.

In that case the constitutionality of an act of the State of Arkansas requiring railroads and some other corporations and persons to pay their employes on the day of their discharge, unpaid wages then earned, at the contract rate, without abatement or reduction, failing which, such wages should continue as a penalty at the same rate until paid, was under discussion. The court held this act to be void as to natural persons, but valid as to corporations under the reserved power to alter, revoke or annul their charters. After considering some instances in which legislation affecting the right to contract was deemed admissible, the learned court proceeded as follows:

"We have thus far spoken of the limitations that can be

imposed on the right to contract. We have seen that the power of the legislature to do so is based in every case on some condition and not on the absolute right to control. We think that it is obvious that the right to contract can not be limited by arbitrary legislation which rests on no reason upon which it can be defended; for if it could, the right would cease to exist and become a license revocable at the will of the legislature, and the government would become a despotism in theory if not in fact. Such a power can not exist, for if it could, it would be subversive of the right to enjoy and defend liberty, to acquire and possess property and to pursue happiness, declared to be inalienable by the constitution of this state. When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to persons or society or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract or controlling the terms thereof."

An ordinance of a city in the State of Arkansas prohibited drumming or soliciting patronage for hotels, boarding houses, bath houses, physicians, quacks and venders of nostrums. It was held void as to physicians and hotels, boarding houses and bath houses.

Thomas v. *City of Hot Springs*, 34 Ark. 553.

The court said:

"No doubt a corporation may make it a penal offense for any person to drum customers to gaming houses, gambling tables, banks, etc., * * * and other occupations which are immoral and pernicious in their character and tendencies, such as it has power under its charter to suppress. But the keeping of hotels, boarding houses, bath houses and the practice of medicine by competent persons, are ordinary, lawful and useful occupations, and to make it a crime to solicit custom for them, is an unwarranted interference with constitutional rights and privileges of citizens under our form of government. In this case appellant was charged and convicted for soliciting a patient

to a physician, who was a graduate of medicine, and skilled, it is admitted, in his profession. It may be in bad taste, and a violation of the ethics of his profession, for a physician to employ a drummer to procure patients for him, but appellee had no legal power to make such drumming a crime, and punish it as such."

The phrase showing that the court regarded this ordinance as an unwarranted interference with constitutional rights has been quoted because the decision seems to be also based upon the proposition that the city lacked authority under the statute to pass such an ordinance. However, the reason for this holding seems to be in substance that the ordinance was illegal upon the grounds indicated in the quotation. This case is also reported in 36 Am. Rep. 24.

An important decision upon constitutional law is *State* v. *Scougal*, 3 S. Dakota 55, also reported 44 Am. St. 756.

This case held that the incidental powers of banking, as discounting and negotiating notes, bills, drafts, etc., receiving deposits, buying and selling exchange, coin and bullion and loaning money, required no legislative sanction for their exercise and that an individual could not be deprived of the right to exercise those powers by state legislation. In this opinion there is an interesting discussion as to the extent of the police power; page 67 the court observes:

"According to the maxim *sic utere tuo ut alienum non laedas*, it must be within the range of legislative action to define the mode and manner in which one may so use his own as not to injure others, subject to the provisions of the Constitution, State and National, and to those great fundamental principles enunciated in the Declaration of Independence; but under this power it is not competent for the State to prohibit the citizen from carrying on any trade, occupation or business that is not offensive to

the community or injurious to society; the business may be regulated but not prohibited."

At page 69 the court concludes this discussion with this language:

"If the police power of the State is as broad and comprehensive as claimed by the learned attorney general, the citizen holds his right to liberty, to his property and to the pursuit of happiness at the will of the legislative power alone. But the rights of the citizen are not thus left to the will of the law-making power; the State constitution and the National constitution have placed around the rights of the citizen safe-guards that protect them from invasion by legislative action."

After quoting the provision of the State constitution and a paragraph from the Fourteenth Amendment to the Constitution of the United States, the court remarks:

"These constitutional provisions are not mere glittering generalities, but constitute sacred guaranties to the citizen that his liberty and his right to the pursuit of happiness shall not be abridged, and his right to his property shall not be invaded by the legislative power except so far as authorized by the sovereign power as expressed in the constitutional provisions, or by due process of law."

And again, p. 72:

"In these constitutional provisions are found the guaranties to the citizen of his right to liberty, his right to the pursuit of happiness, his right to pursue in his own way any lawful business or calling and his right to property as well as from those great fundamental principles which underlie our system of government."

In general it may be said that a state can not, under the guise of the exercise of the police power, overthrow or impair the constitutional rights guaranteed to its citizens. It is not within the power of the Legislature, under the pretense of exercising the police power of the state, to enact laws not necessary to the preservation of the health and safety of the community, or

that will be oppressive or burdensome on the citizens, and the question whether or not the Legislature has passed the just limit of its powers in this regard is always a judicial question.

Slaughterhouse Cases, etc., 16 Wall. 36.

Toledo, etc., Railway v. *The City of Jacksonville*, 67 Ill. 37.

Liquor Cases, 25 Kan. 751.

37 American Report, 284.

State v. *Fisher*, 52 Mo. 174.

In re Jacobs, N. Y. 98; 50 Am. Rep. 636.

People v. *Marx*, 99 N. Y. 377; 52 Am. Rep. 34."

An act requiring railroad, express and telegraph companies to give in writing to a discharged employe the reasons for his discharge and if induced by any complaint or communication made to the company to inform him of the nature, substance and date of such communication, was held unconstitutional in Georgia as "violative of the general private right of silence."

Wallace v. *Ga. C. & N. Ry Co.*, 94 Ga. 732. No opinion.

A statute of Missouri prohibited employers from entering into any agreement with an employe requiring him to withdraw from or refrain from joining any trade or labor union.

This act was held unconstitutional by the Supreme Court of that state.

State v. *Julow*, 129 Mo. 163; S. C., 50 Am. St. Rep. 443.

The court said:

"Now, as before stated, each of the rights heretofore mentioned carries with it as its natural and necessary coincident, all that effectuates and renders complete and full, unrestrained enjoyment of that right. Take, for instance, that of property; neces sarily blended with that right are those of acquiring property

by labor, by contract, and also of terminating that contract at pleasure, being liable, however, civilly for any unwarranted termination."

And again:

"If an owner, etc., obeys the law on which this prosecution rests, he is thereby deprived of a right and a liberty to contract or terminate a contract, as all others may; if he disobeys it, then he is punished for the performance of an act wholly innocent, unless, indeed, the doing of such an act guaranteed by the organic law, the exercise of a right of which the Legislature is forbidden to deprive him, can, by that body, be conclusively pronounced criminal. We deny the power of the Legislature to do this; to brand as an offense that which the constitution designates and declares to be a right, and therefore an innocent act, and, consequently, we hold that the statute which professes to exert such power is nothing more nor less than a "legislative judgment," and an attempt to deprive all who are included within its terms of a constitutional right, without due process of law."

To these propositions many cases are cited. Counsel for the state cite a similar statute in Indiana as indicating that the statute here in question is valid.

The constitutionality of an ordinance adopted by a city in California, which provided that any person who kept or maintained a room or other place where opium or any of its preparations were sold or given away, and every person, who resorted to or frequented such room or place should be guilty of a misdemeanor, providing that it should not apply to the sale or gift of any preparation of opium by any druggist for any purpose not caused by the use of opium or any of its preparations arose in a case at the Circuit. This ordinance was held to be in conflict with the Fourteenth Amendment and void. *In re Ah Jow*, 29 Fed. Rep. 181.

This was so declared, inasmuch as this ordinance made it a crime for any person, whether knowing the character of such a place or not, to enter it, or knowing it, to enter it for any lawful purpose. Judge Sawyer said:

"It is to prohibit an act which is innocent in itself and lawful under the general laws of the land and, therefore, inconsistent with the laws of the land. It is to put an unlawful inhibition upon the inalienable rights and liberties of the citizen; and to commit him to prison for doing so, is to restrain him of his liberty without due process of law, in violation of the Fourteenth Amendment to the National Constitution. See *Yick Wo* v. *Hopkins*, 118 U. S. 356."

In the case referred to by Judge Sawyer, Mr. Justice Matthews used this language:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agency of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must be always lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under

the reign of just and equal laws, so that in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth "may be a government of laws and not of men." For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

This is indeed a noble and philosophical statement of the great essential principle of constitutional liberty.

The actual question involved seems perhaps of small moment: whether a humble Chinaman might carry on a laundry in a frame building in San Francisco.

But every case in which constitutional right is asserted is important, involving, under the Fourteenth Amendment, as was said in that case, "the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court."

It was held by the Circuit Court for the Northern District of Texas that a statute of that State which makes it criminal for two or more persons to combine as partners, corporators or otherwise in the ordinary business of life, to increase or reduce the price of commodities or fix the standard thereof, or for two or more persons to agree to limit or reduce the production of commodities, or for two or more persons to combine for the purpose of limiting competition, or to make an agreement in relation to the price of an article so as to preclude an unrestricted competition between them, or themselves and others, or for two, or more persons to create and carry out restrictions in trade, violates the Four teenth Amendment of the Federal Constitution

It is true that this court reversed the judgment of that court, the proceeding being *habeas corpus*, but without discussing the questions involved in that case. This case contains an extended discussion as to the nature of the rights to life, liberty and property secured by the Fourteenth Amendment; and the learned judge calls attention to a distinction which is not unimportant, where he remarks that no attempt is made by the act there in question to condemn only acts which are oppressive by reason of their magnitude.

In re Grice, 79 Federal, 627. It is true the court in that case seems to have been somewhat influenced by the decisions in the lower courts of the case of *United States* v. *Trans-Missouri Freight Association*, reversed in this court; but that case was a case where the validity of congressional legislation was in question, which was held to prohibit combinations and agreements in restraint of trade entered into by those engaged in a business impressed with a public use or trust.

A statute of Ohio provided that no railroad company, insurance company or association of other persons, should require any agreement or stipulation with any other person in or about to enter into the employment of a railroad company, whereby such person agreed to waive any right to damages from such railroad company for personal injuries, or any other right whatever, and that all such agreements and stipulations should be void. It was held by Judge Ricks, in the Circuit Court of the United States for the Northern District of Ohio, that such a statute was contrary to the Fourteenth Amendment. *Shaver* v. *Penn. Co.*, 71 Fed. Rep. 931.

The Supreme Court of Illinois in a long line of cases has elaborately vindicated the essential right to liberty secured by the constitution of that state and by the Fourteenth Amendment of the Federal Constitution.

One of the more recent of these decisions, which cites many that have gone before, is the case of *Braceville Coal Company* v. *People*, 147 Ill. 66.

A statute of Illinois provided that every manufacturing, mining, lumbering, mercantile, street, electric and elevated railway, steamboat, telegraph, telephone and municipal corporation and every incorporated Express Company and Water Company should pay its employes weekly. This statute was held to be unconstitutional.

This case, with the cases from Illinois hereafter cited, establish the proposition that liberty as used in the constitution means not mere freedom of the citizen from servitude and restraint, but the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such vocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare.

In *Gillespie* v. *People*, 188 Ill. 176, an act, similar to the Indiana statute cited by counsel, making it a criminal offense for an employer to attempt to prevent his employes from joining labor unions or to discharge them on account of membership therein, was held to be unconstitutional. The court, referring to constitutional inhibitions against taking away life, liberty or property and the rights thus guaranteed, said, p. 183:

"These terms include the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary

arrests, the right freely to buy and sell as others may. Indeed, they may embrace all our liberties, personal, civil and political, including the rights to labor, to contract, to terminate contracts, and to acquire property. None of these liberties and rights can be taken away except by due process of law. (2d Story on Const., 5th Ed., Sec. 1950.)

The rights of 'life,' 'liberty' and 'property' embrace whatever is necessary to secure and effectuate the enjoyment of those rights. The rights of liberty and of property include the right to acquire property by labor and by contract. (*Ritchie* v. *People*, 155 Ill. 98.)

If an owner can not be deprived of his property without due process of law, he can not be deprived of any of the essential attributes which belong to the right of property without due process of law. Labor is property.

The laborer has the same right to sell his labor, and to contract with reference thereto, as any other property owner. The right of property involves, as one of its essential attributes, the right not only to contract, but also to terminate contracts."

The case of *Ritchie* v. *People*, 155 Ill. 98, contains an extensive review of the authorities upon the question how far the Legislature, in the exercise of its police power, may trench upon the constitutional rights to life, liberty and property.

In that case a statute providing that women should not be employed more than eight hours a day in any factory or workshop, nor more than forty-eight hours in any one week, was declared to be unconstitutional. It may well be doubted whether this case was rightly decided; but the opinion is worthy of careful consideration in its review of previous decisions of that and other courts. It would not seem to be a violent presumption in favor of legislation that there was some fair, just and reasonable connection between this limitation of the hours of labor of women under unsanitary conditions and the public health.

This case was followed in *Bailey* v. *People*, 190 Ill. 28, where it was declared that an act discriminating against lodging houses and in favor of hotels was unconstitutional and this case and many other Illinois cases were cited. This case cites all the recent Illinois cases on the subject and it will not be necessary to comment upon them further.

The case of *Harding* v. *Glucose Co.*, 182 Ill. 551–621, citing *Ford* v. *Chicago Milk Shippers' Assn.*, 155 Ill. 166, holds that the anti-trust act of June 11, 1891, adopted by the Legislature of that state is constitutional—a proposition since re-affirmed in a recent unreported case. That is immaterial here, as the accused are not charged under any such act, nor with attempting to engross, monopolize or restrain trade, but with malicious injury to the business of a competitor.

The case of *Booth* v. *People*, 186 Ill. 43, is of special importance as it was afterward affirmed by this court. That was a prosecution brought under section 130, Criminal Code of Illinois, which prohibits dealing in options on grain, stocks and other commodities.

This statute was attacked as an unwarranted interference with the liberty of contract, condemned by the constitution of Illinois and by the Fourteenth Amendment of the Constitution of the United States. But it was sustained and upon this idea: that it was a law enacted for the suppression of gambling and having a direct and necessary connection with that end. The fundamental idea which runs through the opinion of the court in this case is that this forms a well recognized exception to the general doctrine upon the subject; that is to say that, to the general rule that the right to make all contracts not illegal or immoral

at the common law and which therefore may be regarded as innocent in themselves, is protected by organic law and by this particular provision of the Federal Constitution. There are well settled exceptions; a wagering contract was not void at common law, yet there has never been any doubt of the constitutional power of the Legislature to prohibit such contracts and to punish those who enter into them, as well as to declare the invalidity of the contracts themselves. In the case referred to the court said:

"Laws for the suppression of all forms of gambling have, without exception, so far as we are advised, been regarded by the courts and law-writers as a proper exercise of the police power."

And again:

"The practice of gambling on the market prices of grain and other commodities is universally recognized as a pernicious evil and that the suppression of such evil is within the proper exercise of the police power, has been too frequently declared to be open to discussion."

The court also held that the denial of the right to make such option contracts, tended materially to the suppression of the evil of gambling in grain options, which it was the legislative intent to extirpate.

The opinion of this court, by Mr. Justice Harlan, proceeds upon similar lines. *Booth* v. *Ill.*, 22 S. Court Rep. 425.

The learned justice there said, page 427:

"A calling may not in itself be immoral and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils can not be reached

unless that calling be actually prohibited, the courts can not interfere unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals, has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

And further:

"It must be assumed that the Legislature was of the opinion that an effectual mode to suppress gambling grain contracts was to declare illegal all options to sell or buy at a future time. The court is unable to say that the means employed were not appropriate to the end sought to be obtained and which it was competent for the state to accomplish."

From this judgment there was dissent, but no dissenting opinion. It may be presumable to conjecture that this dissent was based upon the idea that while the State Legislature might prohibit gambling in grain, this statute went beyond the necessities of the case and struck down contracts which had no necessary connection with such illegal operations.

Now, there are numerous subjects upon which the right of the Legislature to interfere with the right of contract is recognized; the rate of interest is one subject; the contracts of seamen and sailors are subject to similar regulations. These are, however, in the nature of exceptions to the general rule and these exceptions should not be multiplied or extended.

In *Allgeyer* v. *Louisiana*, 165 U. S. 580, this court held a statute of Louisiana unconstitutional when construed by the Supreme Court of that State to prevent an owner of cotton in Louisiana from sending to an insurance company of another State, not authorized to do business in Louisiana, an order by mail for insurance on the cotton to be shipped to a foreign port in

pursuance of a valid contract for such insurance previously made and to be performed in the other State.

Mr. Justice Peckham, writing for the court in that case, said:

"The Supreme Court of Louisiana says that the act of writing within that State the letter of notification was an act therein done to effect an insurance on property then in the State in a Marine Insurance Company, which had not complied with its laws and such act was, therefore, prohibited by the statute. As so construed, we think the statute is a violation of the 14th Amendment of the Federal Constitution, in that it deprives the defendants of their liberty without due process of law. The statute which forbids such act does not become due process of law because it is inconsistent with the provisions of the Constitution of the Union.

"The liberty mentioned in that amendment means not only the right of a citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation and for that purpose to enter into all contracts which may be proper, necessary and essential, to his carrying out to a successful conclusion, the purposes above mentioned."

This liberty, these rights, are not only essential and fundamental; they are not only declared in the Declaration of Independence and plainly consistent with and demanded by the very spirit of American free institutions, but they are and were by this court in that case declared to be constitutional rights secured by the organic law of the Nation and above and beyond the power of state legislators; state legislation can not defeat nor annul them.

It has not seemed necessary to particularly examine the

cases decided in this court under the Sherman Anti-trust Act of 1890. They have been so recently decided and are so familar to the court that they can by no possibility be overlooked, in so far as they are material. These cases are *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290; *United States* v. *Joint Traffic Association*, 171 U.S. 505; *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 212–249.

However, it may not be improper to say that the views of this court, as announced in the last of these cases, seem to take cases of this character arising under congressional statutes passed to regulate state and foreign commerce entirely out of the category of cases under consideration in this argument; for this court has explicitly declined assent to the proposition that the constitutional guaranty of liberty of contract to the individual, secured by the Fifth Amendment to the Constitution, in anywise limits the power of Congress in respect of, or prevents it from legislating upon, the subject of contracts relating to interstate commerce; and has explicitly declared that the right of Congress to legislate upon this subject is entirely unfettered by this amendment; that the commerce clause qualifies the right secured by the amendment in this regard, and the amendment does not qualify the right to legislate under the commerce clause.

Page 234–235 in the case last referred to, this court said:

"We conclude that the plain language of the grant to Congress of power to regulate commerce among the several states, includes power to legislate upon the subject of those contracts in respect to inter-state or foreign commerce, which directly affect and regulate that commerce and we can find no reasonable ground for asserting that the constitutional provision as to the liberty of the individual limits the extent of that power as claimed by the appellants."

And again, at page 229 it is said by Mr. Justice Peckham for the court:

"On the contrary, we think the provision regarding the liberty of the citizen is to some extent limited by the commerce clause of the Constitution and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely and collaterally regulate to a greater or a less degree commerce among the states."

In a recent case in the Circuit Court for Nebraska, Judge Smith McPherson of the Southern District of Iowa held that the Nebraska Anti-trust Act of 1897 in its general scope exceeds the powers of the state and is unconstitutional and void as depriving persons of their liberty in violation of the Federal Constitution, which includes liberty to make and enforce contracts, that being a fundamental right of the citizens of the United States.

The question arose on a bill filed by a number of fire insurance companies organized under the laws of various states and doing business in Nebraska, to enjoin the officers of that state from enforcing this law, the complainants having employed a kind of a commissioner to fix insurance rates and agreeing to be bound by such rates as he should fix; and it was apparently this arrangement which the officers of Nebraska insisted was a violation of the statute. In that case the learned judge remarked:

"The Railroad Traffic Association case, 166 U. S., 290, by the United States Supreme Court, has been strongly urged by the attorney-general as upholding the doctrine of this statute. But it does not for the reason that the statute under consideration in that case was upheld by reason of the commerce clause of the Constitution, and to that extent the commerce clause controlled the other clauses of the Constitution, and I repeat that the statute

with which I am dealing, is a state statute." *Niagara Fire Ins. Co.* v. *Cornell*, 110 Fed. 816.

The learned judge, after reciting in a general way the provisions of the statute, makes a picturesque and forcible arraignment of it which is not inapplicable to all legislation of this class. He says:

"If this statute is valid, two men in the same line of business in the same town or village can not form a partnership if it tends to maintain prices. They must continue, each for himself, until one or the other or both are destroyed. Neither can a stock company nor a corporation be formed by two or more if, by so doing, the price is maintained. This statute is not a step, but it is a long stride, hundreds of years, backward, when monarchs, cabinet officers, and even parliament decreed the price to be paid for a day's labor, and the cost of all the necessaries of life, even to the loaf of bread. Any one with but the slightest knowledge of history will recall what tyranny and brutality existed in England by reason of such laws and in France down to the Revolution. If this statute is valid, the next step may be, and can be and probably will be, the granting of exclusive rights to certain persons, only, to pursue an occupation. It would be probable because those let in would be the more thrifty. Drive out three-fourths of the barbers, or waiters or carpenters or blacksmiths and those remaining would be thrifty, even at the old price. Competition and contracts would be at an end. If we can not acquire property, then we have a government of socialism. And how can we acquire property or enjoy the property we do have, without the right of contract? If this law is valid, two or more farmers can not agree that they will not sell their wheat to a neighboring mill for less than so much per bushel. Two or more farmers can not agree that the live-stock feeder shall not have their corn, only at a certain price. Blacksmiths can not agree that they will charge so much for shoeing horses. Nothing can be agreed to by the manufacturer, the farmer, gardener, the contractor, consumer or laborer to prevent the reduction of price. Can it be possible that such legislation is

valid? If it is valid then what becomes of the provision, 'No man shall be deprived of the equal protection of the law,' or of that other provision, 'No man shall be deprived of life, liberty or property without due process of law?'

Justice Field once said: 'The right to pursue them without let or hindrance is a distinguishing privilege of the citizens of the United States, and an essential element of that freedom which is their birthright.' Another justice of the United States Supreme Court said: 'Yet the power does not and can not extend to prohibiting a citizen from making contracts, and this is institutional law in England as well as America.' Another great judge has said: 'Liberty includes the right to acquire property and that means and includes the right to make and enforce contracts.' And I dare say that there is not an Appellate Court in this Union but has given a like definition of liberty, 'the right to make and enforce contracts.' Without it, in the language of Justice Miller, emphasized by Judge Dillon, already quoted, 'And there is no doubt that, if this clause were removed to-morrow, this Union would fall to pieces.' We could not exist as a free people, but would be the slaves to every legislature that could be carried off its feet by first one public clamor and then another. Parties can not only make contracts, but they may violate them, subject to being held responsible in damages. It will be recalled that a few years ago one of the United States judges issued an injunction in effect prohibiting employes of a railroad from agreeing in a body to quit work. The Court of Appeals of the Seventh Circuit, presided over by Justice Harlan, of the Supreme Court, reversed the decision, in effect holding that it was lawful for the employes by agreement to quit in a body because their wages had been cut down. Citations could be made at great length from jurists and statesmen, practically without conflict, as to the right of contract being the greatest of all blessings enjoyed by a free people, and guaranteed us by the Constitution so long as that instrument may last."

While the opinion of the learned judge was evidently written "*dum fervet opus*," it nevertheless contains a stalwart and

breezy assertion of the right of individual liberty, which should not be lightly passed over.

In a very recent case in this court Mr. Justice Holmes has said:

"If the state thinks that an *admitted evil* can not be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts can not interfere, unless in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law.'"

Otis v. *Parker*, 23 Sup. Ct. Rep. 168–170.

Regarding some measure of combination or concert of action as indispensable in all competitive effort on a large scale, it can not be said that such combination, much less the competition which it promotes, is an "admitted evil," though it may be hostile and injurious to those rivals in trade at which it is aimed. The difficulty in admitting the principle contended for by the state is that it at once removes all constitutional limitations upon the power of the state in this field of legislation.

While in the case just referred to Mr. Justice Holmes employed the language quoted he also declared it to be true "that neither a state legislature nor a state constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an enactment purports to be for the protection of public safety, health or morals, is not conclusive upon the courts."

The case in hand was strictly within the principle of *Booth* v. *Illinois*. The Constitution of California, as a means of checking the evil of gambling in stocks, declared all contracts for sales of stock on margins to be void, and permitted recovery of moneys paid thereon; and this was held within the power of the state.

It must be the true rule for the construction of the Four-

teenth Amendment that it secures to the individual not only life and property, but liberty, in its broadest sense, including the right to pursue all lawful avocations, to acquire property, to trade, enter into contracts, etc.

These rights are perhaps to some extent subject to the police power of the state.

It may not be possible nor even desirable to attempt to indicate definitely and precisely the limits of this power. That those limits exist is quite clear; as, if they do not, the constitutional guaranty secures nothing, and all these essential rights are held entirely subject to the power of the state. To say, for instance, that a person, under this guaranty, is absolutely protected in his right to make all lawful contracts, and then to add, that whether or not a given contract is lawful depends entirely upon the legislation of the state in which the contract is made, is simply to announce that the Federal Constitution secures nothing of liberty in this regard, but that the authority of the state is plenary and paramount.

Certainly, state legislation to promote the public health (*Powell* v. *Pennsylvania*, 127 U. S. 678), to secure public safety (*Smith* v. *Alabama*, 124 U. S. 465), to prevent gambling transactions injurious to the public morals (*Booth* v. *Illinois* and *Otis* v. *Parker*, *supra*), is admissible and has been repeatedly sustained in this court. These are well recognized heads of proper legislative and local authority in the exercise of the power of the police. But when it is attempted to go beyond this—to proscribe absolutely all combination or concert of action in the competitive struggles of ordinary trade and commerce, which tend to injure and are intended to injure rivals in trade—all just notions of the

legitimate bounds of the police power are abandoned and such legislation becomes odious, paternalistic, and offensive in the highest degree.

Men are in a measure able to combat assaults upon their liberty of action which proceed, as in cases of competition in trade, from those on an equal footing. This liberty is more obviously in danger when assailed by governmental action.

A great political philosopher has well said:

"Liberty, too, must be limited in order to be possessed. The degree of restraint it is impossible in any case to settle precisely. But it ought to be the constant aim of every wise public counsel to find out by cautious experiments, and rational, cool endeavors, with how little, not how much, of this restraint the community can subsist; for liberty is a good to be improved, and not an evil to be lessened."

Burke, 2 Wks. 229.

Another great man, a distinguished American lawyer and statesman has said:

"It is no part of the duty of a state to coerce the individual man except so far as his conduct may injuriously affect others, not remotely or consequently, but by direct invasion of those rights which are guaranteed by law and which the law must therefore recognize and protect."—SAMUEL J. TILDEN.

I quote in a measure from memory, and have no means of exactly verifying the language quoted. The substance is as given, and I think the exact language.

I shall now proceed to the consideration of the last question in the case, which is, conceding for argument only, the power of the state to interdict such conduct as is charged against the accused, is the statute in question a legitimate and constitutional exercise of that power.

III.

In discussing this point it will be necessary to consider the extent to which, if the judgment of the court below is sustained, it will be admissible for the states to infringe upon the rights sought to be secured by the Fourteenth Amendment.

The effect of the last three amendments was first considered in the *Slaughter House Cases*, 16 Wall. 36–130; and it is a singular fact that in the great debate in that case between those giants of the bench, Miller, Bradley and Field, the invalidity of the legislation of Louisiana in question was nowhere distinctly asserted, upon the ground that it deprived individuals in that state of liberty, although the rights of citizens, state and national, were fully discussed.

The authorities cited illustrate how the law has progressed since this first memorable occasion.

The statute in question already quoted aims its denunciation at "any two or more persons who shall combine * * * together for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by any means whatever;" *i. e.*, thus injuring, *inter alia*, the trade or business of another.

Nothing is more certain than that such injury by some means has always been lawful, is clearly moral and most undoubtedly within constitutional protection. At least this is so, unless the whole competitive system is unlawful and immoral. If a just application of the golden rule requires every merchant to seek trade for his competitor, every manufacturer to turn over his orders to another, every physician to direct his patients to his

professional rival, every publisher of a newspaper to send his advertisers to the business office of another journal, then it may be plausibly contended that in competition itself there is something essentially immoral to which the power of the police may justly attach. Such views can not be regarded as "counsels of perfection;" they are rather the suggestions of lunacy. In these days of organization, concert of action is an indispensable element in the conduct of business. Indeed it always has been. It is found in every instance where one man employs another; it is perhaps further developed in partnerships and finds larger expression in great corporate organizations. Now I affirm that the right to combine to injure a rival in business by diverting his trade by lawful means, is a constitutional right, a part of the liberty secured to individuals by the Fourteenth Amendment. It is an indispensable adjunct to the right to pursue a lawful vocation and the liberty of action in connection therewith which is necessary in order to any possible chance for success.

It may be, I do not debate that question, that the public interest requires the absolute extinction of this liberty and the erection of the dull, monotonous and gloomy fabric of state socialism, *moles ingens, immanis*, upon the ruins of industrial liberty and the competitive system. But will any, even the most benevolent, paternal and radical advocate of such a change contend that it can be inaugurated without radical innovations in organic law both state and Federal? I think not.

The decision below, with great deference to the learned court which pronounced it, is a step in the wrong direction. The legislation of the state construed in favor of liberty, loosely worded

though it was, might possibly answer every reasonable and legitimate purpose of its framers in reaching admitted evils and correcting conceded abuses. As construed by the court it becomes an instance of that meddlesome and odious interference with the methods of business universal among our people, which occasionally work, as in this instance, great hardship and injustice to individuals, but are quite inadequate to affect general conditions.

There is no question of restraint of trade or the validity of any contract tending to monopoly in this case. No statute of Wisconsin having any relation to these subjects is invoked. The case rests wholly on Sec. 4466a, statutes of 1898, to which reference has been frequently made.

I have before adverted to the fact that although the information in this case charges the acts counted upon as done maliciously and the opinion of the court below seems to turn largely upon this point, the statute assailed imposes no such requirement. The offense created is complete if done either "willfully *or* maliciously." "Willfully" as here used means "knowingly" or "intentionally." Therefore if this statute be upheld, a person who, absolutely without malice—*i. e.*, a wicked purpose to injure without lawful excuse, even with a sincere disposition to avoid such a necessity, as a last resort to save himself in the fierce struggle for existence, intentionally combines with another to promote his own business at the expense and thus to the injury, of a rival, is clearly guilty of the offense created, and must suffer the penalty denounced. It matters not what form this combination or concert of action may take nor how innocent the means employed. For the statute declares the offense, if the concert be to injure another willfully by "*any means whatsoever.*" If two merchants

join in issuing a trade bulletin or advertising sheet to promote their several enterprises at the expense of loss of trade to another, they are within its ban. If the directors of a business corporation endeavor to hire a competent man from a rival who will take some of the latter's trade, they are clearly guilty. If a firm of lawyers, for the same reason seek to induce a member of another firm to join them, they must be punished.

If the partners or directors of a large mercantile house agree to try to hire an efficient salesman from a rival house, they certainly have committed an offense. Indeed, it seems equally clear that if the elders, vestrymen or others in charge of a large church should attempt to secure some popular clergyman from another congregation, in order to attract some of his following, they are, if not felons, at least guilty of a grave misdemeanor under this statute.

It is not necessary under its plain prescription that the combination should be wrongful. Neither this word nor the term wrongfully is found in the statute. It is not necessary that any illegitimate, illegal, improper or immoral means shall be employed; "any means whatsoever" declares the law. It is not requisite that the concert charged should be malicious. It is within the statute if willful or malicious; "willfully *or* maliciously" being the exact language employed.

If such a statute can be sustained then the constitutional right to liberty secured or attempted to be secured by the organic law of the nation is "a delusion, a mockery and a snare." It means nothing. The states may override it at their will; and the tribunals of the nation must sit idly by and view, in judicial

impotence, the fantastic and discordant proceedings of the legislatures of forty-five separate states.

This is an age of legislation; of law-making on every conceivable topic. The old idea once somewhat in favor that that government governs best which governs least seems to have been entirely abandoned. Space does not admit of citation to sustain what is common knowledge and requires no authority for its support. But if any member of this court desires other verification than his judicial experience affords, let him glance over the addresses of the presidents of the American Bar Association for the last few years.

Mr. Justice Field, in speaking of the privilege and immunity clause of the Constitution, once said, with that felicity of expression which marked his judicial utterances:

"It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. * * * It insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."

Paul v. *Virginia*, 8 Wall, 168.

But if so much may be said and justly said of that provision, what shall be said in similar vein of the Fourteenth Amendment to that instrument? Slowly and steadily it has worked almost a revolution in the relation between the states and the general government.

In *Gibbons* v. *Ogden*, 9 Wheat. 189, Chief Justice Marshall

in expounding the commerce clause of the Constitution and defining the general scope of that instrument, said:

"The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."

Now by this amendment the essential rights of the individual, unless forfeited by due process of law, are placed beyond the power of the state and made the subjects of national cognizance and protection.

So frequently has successful resort been made to its guaranties that when great questions depending on its construction are debated, we scarcely pause to reflect on how differently they must have been resolved had they arisen before its adoption.

I can not now digress to illustrate this; but the great Nebraska rate cases,

Smyth v. *Ames*, 169 U. S. 466,

show how radical is the change involved; and a study of previous decisons will demonstrate how gradually this court advanced to the ground taken in that case; ground which will never be abandoned.

In these brief lines, applying to the states limitations which the original amendments attached to the exercise of national power, it is declared, "nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

For the first time the adoption of this amendment created *magna charta* of national constitutional liberty. It is of course conceivable that the mere existence of this Federal guarantee has tended to relax the vigilance of the friends of liberty in respect of state legislation. But this suggests only further vigilance in its enforcement at the hands of national authority.

This amendment is a new declaration of independence; a great national bulwark against invasion of the essential rights to life, liberty and property which extends not merely to citizens but to every person within this broad land and, let us hope, in all its territories beyond the seas. It is and should be a shield and protection to every one against oppressive, injurious and meddlesome interference by the states with the inalienable rights of men.

In the case from which I have already quoted, Lord Mansfield refers to King's Bench as the "general censor and guardian of the public manners."

This is, in a land of freedom, the office neither of court nor legislature. To such an idea the dictum of the late Lord Herschell, already quoted, may well be opposed. "I am not behind my noble and learned friends in the desire to preserve individual liberty. But I think it is never in greater danger than when a tribunal is urged to restrict liberty of action because the manner in which it has been exercised in a particular instance may be distasteful." *Allen* v. *Flood*, already cited.

I must confess to some difficulty in understanding how the learned court below was betrayed into the use of such inaccurate language as marks discussion of the statute in question. In the concluding portion of the opinion it is said: "The term 'malicious injury' as used in the statute is synonymous with that

term at the common law." It might be quite material to define that term if it were found in the statute; but it is not. And as already pointed out, malice is not a necessary ingredient of the offence created by this statute. I have read and re-read it carefully and find nothing whatever to warrant the language of the court.

The statute says nothing whatever about "malicious injury." It does very plainly and clearly declare that two or more who "willfully *or* maliciously" combine to injure, shall be punished. Willfully means intentionally, and is distinguished from maliciously in that it does not import an *evil* mind or intent.

2 Bouvier's Law Dictionary.

In the statute it is thus employed disjunctively, indicating that this distinction was present in the legislative mind. Inasmuch as the information distinctly charged malice, possibly the learned court regarded any critical examination of the statute in this regard as immaterial.

It is true, malice seems to be required by the statute where persons combine to compel a person to do an act against his will; but the information imputes no such combination to the accused. It would appear somewhat from the opinion as if the learned court held the accused guilty of everything charged, without careful examination of the statute to see whether it was constitutional upon a sound construction of its language and irrespective of the case before the court; and that then, reversing this process, the court was disposed to hold the accused for a crime covered by the statute but not by the information.

For the opinion, declaring the primary end of the combina-

tion to be to force the Journal Company to reduce its advertising rates to the old standard or cause it to lose custom, remarked that one of these alternatives (obviously the former) would result in the destruction of the freedom of action every one is entitled to enjoy in the conduct of his business, etc., a conspiracy to do this being an offense contemplated by the second clause of the statute.

To this latter offense malice is essential; but the information charges no such offense. The accused can only be properly convicted under a valid statute and upon a criminal accusation showing its violation. It is not sufficient that the statute is valid in so far as it imposes a penalty for conduct not alleged against the defendant; nor, in examining its validity, can its terms be aided by reference to the information. In other words, it is not sufficient to say the accused, if guilty as charged, might be convicted under a statute framed to cover such a charge. For we are now considering the validity of this particular statute; and that must be determined by its language, and not by that of the information.

There may be freedom from competitive assault somewhere; but it does not exist in any jurisdiction with which I am familiar; and where it does, trade and commerce will be stagnant and dead.

Indeed, with deference to the learned court, the idea that the way to promote freedom is to impose more restrictions, and that by the strong hand of governmental power, is fundamentally erroneous.

The constitutional restrictions imposed by the framers of organic law were aimed at governmental action. The people and

the statesmen who led them believed, and rightly, that against the efforts of individuals either singly or in combination there was nothing of danger to society requiring constitutional provision. And so all the limitations in the organic law of the nation are imposed upon governmental action either by the several states or by the various repositories of national power.

At this time the tendency is strong to regulate everything by law. Never has there been a time in our modern history, except possibly during the civil war, when it was more important to the nation that these limitations should be observed nor when they have been subjected to greater strain.

The opinion of the learned court below seems to be addressed largely to the power of legislation, national and state, in respect of combinations and contracts in restraint of trade. No one doubts that some such power exists.

But I deny the power of either nation or state absolutely to prohibit all concert of action in private competitive business; and still more to declare that every effort in that field by two or more to injure, without malice or wrong, a competitor, in his business, by any means, whether lawful or unlawful, shall be punishable as a crime.

Again, I repeat, some concert of action, some combination or co-operation is indispensable to any success in modern business. Liberty to enter into it must be conceded. That it may be regulated by state and federal authority is quite probable; that it can not be abrogated entirely is absolutely certain.

It is not less true that the effect of such concert so far as it is at all effective is to injure competitors or rivals in business. Such is its purpose in most cases; and as an inevitable consequence in

every instance where it succeeds, such may be regarded as its object in all cases.

Now all such concert, whether wrongful or not, willfully to injure, is prohibited by this statute. It is so prohibited, if attempted, not only by unlawful means, but by any means whatsoever. This is therefore no regulation of the exercise of a constitutional right but an absolute denial of it.

This statute is not aimed at contracts in restraint of trade nor contracts nor arrangements tending to monopoly.

It is not restricted to prohibition of "combinations of individual independent interests, designed to remain independent for most purposes, but to act in combination to control trade." This ponderous phrase, employed by the court below, may or may not well describe the conspiracy charged against the accused; but it certainly is not, nor is its equivalent, found in the statute. The statute is not restricted to any such conduct.

It is not aimed apparently at "malicious combination," at "wrongful combination," at combination such as the court holds may be prohibited; but absolutely at all concert of action or cooperation entered into knowingly to injure the business of another and build up that of those undertaking it.

That is, so the learned court holds, and, no doubt, this court must take the statute as thus construed.

Wabash, etc., R. R. v. *Illinois*, 118 U. S. 557–596.

Of course, in my opinion, the statute was never designed nor intended to have any such application. But if it admits of such construction, it is clearly an unwarranted invasion of the liberty guaranteed by the Fourteenth Amendment.

In criticising the opinion of the court below on *habeas corpus*, I have indicated that no evidence was offered on that hearing in the Circuit Court. This is literally true as to plaintiff in error, but not as to Messrs. Aikens and Huegin. It appears that as to them the evidence taken in police court was offered; but the Circuit Court decided the case wholly on the sufficiency of the complaint; and the Supreme Court expressly says that, had that court gone further and examined the evidence, the result would not have been different, as the evidence only tended to establish the truth of the complaint.

This being so, the suggestion by the Supreme Court that there was some proof that the accused made the agreement to maliciously injure the Journal Company, as charged, appears to me irrelevant as the case then stood, as it was clearly inaccurate as to Mr. Hoyt.

But on this writ of error this remark, whether before applicable or not, is not now, because the judgment complained of was entered against plaintiff in error and the others accused without any evidence, Mr. Hoyt demurring to the information, and the others pleading something in the nature of confession and avoidance, no proof as to either being offered.

I am well aware that this argument is too long. It is a fault not uncommon in such efforts. I will not further protract it except to say that this is a case of importance to the accused. It may be safely assumed that they are not habitual criminals nor indeed properly classified as belonging to the criminal classes. Having done that which I think the court knows judicially, is common and quite generally regarded as legitimate in ordinary trade competition, they find themselves, under a strained con-

struction of a novel statute, condemned as malefactors and adjudged guilty of crime. It is clearly their duty not to rest under this imputation so long as the Constitution and laws of their country afford opportunity to seek relief from it. Such a stigma is not to be lightly regarded nor willingly borne by any self-respecting man. It is not a desirable heritage for his children; it is not a pleasant memory as he looks back upon a life, possibly of honorable and honest endeavor, spent in an important and useful calling.

That such results are possible under the views of the learned court below is in itself enough to suggest grave doubts of their propriety.

If the law so decrees, then the parties thus condemned must bow in submission. But they would be unworthy of the rights to liberty which they claim, did they not resist to the uttermost such a harsh and injurious conclusion.

Respectfully submitted.

CONRAD H. POPPENHUSEN,

JOSEPH L. MCNAB,

Attorneys for Plaintiff in Error.

S. S. GREGORY,

Of Counsel.

APPENDIX.

Supreme Court of Wisconsin.

State ex rel. Durner, Sheriff, v. *Huegin.*

Same v. *Aikens.*

Same v. *Hoyt.*

Opinion filed April 30, 1901.

Error to circuit court, Milwaukee county; Robert G. Siebecker, Judge.

Applications of Albert Huegin, Andrew J. Aikens, and Melvin A. Hoyt for release on habeas corpus. From orders discharging them on habeas corpus the state, on the relation of George Durner, sheriff, brings error. Reversed.

Writ of error to the circuit court for Milwaukee county to review orders thereof, in habeas corpus proceedings, discharging certain persons from custody who were under restraint, according to forms of law, to await trial for the offense of conspiracy to injure. The complaint charging the offense was under oath and as follows:

"Lucius W. Nieman and Lloyd T. Boyd, of the city of Milwaukee, in said county of Milwaukee, being severally first duly sworn, complain to the police court for the city of Milwaukee, Milwaukee county, Wisconsin, that on or about the 5th day of April, A. D. 1900, at the city of Milwaukee, and within said county of Milwaukee, Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, did then and there unlawfully conspire, combine, confederate, associate, agree, mutually undertake and concert together for the purpose and with the intent then and there of willfully and maliciously injuring the Journal Company, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, in its trade and business, and for the purpose and with the intent then and there of willfully and maliciously injuring Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them, in their trade, business and occupation; that the said the Journal Company at all of said

times was, ever since has been and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin as aforesaid, and at all of said times was and now is the owner and publisher of a daily newspaper and advertising medium known as the Milwaukee Journal, published at the said city of Milwaukee, which said newspaper at all of the times herein referred to had, and now has, a large circulation as a newspaper and advertising medium in the city of Milwaukee, and throughout the State of Wisconsin and elsewhere; that it was at all of said times, and now is, the business and trade of said the Journal Company to publish said newspaper and to sell and furnish the same to its patrons and subscribers, and to solicit, receive, print and publish in said newspaper for hire advertisements for merchants and other persons, as is customary with such newspapers, and that at all of said times and especially at the time of the said combination and conspiracy, and subsequently thereto, the said the Journal Company had a large number of advertisers or patrons who advertised in said newspaper, the Milwaukee Journal, and that a large portion of the revenue of said the Journal Company was and is derived from such advertisements; that the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum were at all of said times and now are, stockholders in said the Journal Company, and financially interested in the business and success of said the Journal Company; that the business and trade of the said Lucius W. Nieman is, among other things, that of editor of said the Milwaukee Journal, and the business and trade of said Lloyd T. Boyd is that of business manager of said the Journal Company and of the said the Milwaukee Journal; and that at all of said times the business of said John W. Schaum was and is that of treasurer of said the Journal Company.

"That the prices of advertisements and the advertising rates which newspapers such as said the Milwaukee Journal and the other newspapers herein mentioned are entitled to charge, and which advertisers and patrons are willing to pay, depend and are based largely upon the circulation of such papers and the number of their readers; that early in the year A. D. 1900, said the Journal Company in good faith established a new rate

for advertising in said the Milwaukee Journal, based, among other things, upon its increased circulation, and notified the patrons of and advertisers in the said the Milwaukee Journal thereof, which said rate for advertising was an increase of about twenty-five per cent above that which was charged by said the Journal Company for like advertising in the year 1899.

"That at all of said times the said Andrew J. Aikens was and now is, the business manager of the Evening Wisconsin, a daily newspaper published in the city of Milwaukee, and having also an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire, like unto said the Milwaukee Journal; that at all of said times said Albert Huegin was, and now is, the business manager of the Milwaukee Sentinel, a daily newspaper published at the city of Milwaukee, having an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire, like unto the newspapers aforementioned; that at all of said times said Melvin A. Hoyt was, and now is, the editor of the Milwaukee Daily News, and the president of the News Publishing Company, the corporation owning said the Milwaukee Daily News, a daily newspaper published at the city of Milwaukee and devoted to the purposes of a general newspaper and to advertising for hire, like unto the other of said newspapers.

"That on or about said 5th day of April, A. D. 1900, the exact date whereof being unknown to affiants, said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, with others unknown to affiant, in furtherance and in pursuance of said unlawful conspiracy, combination, confederation, association, agreement and mutual understanding, for the purpose and with the intent then and there of willfully, maliciously and unlawfully injuring said the Journal Company in its trade and business, and also said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them, in their trade and business, and to that end and with the purpose and intent aforesaid, did confederate, agree and mutually undertake that if any merchant or other person or corporation advertising or proposing to advertise in said the Milwaukee Journal, should pay or agree to pay to said the Journal Company the increased rate for advertising established

or fixed by it as aforesaid, that then and in that case any such person or corporation should not be permitted to advertise in any of said other three newspapers, to wit: said the Milwaukee Sentinel, the Evening Wisconsin, and the Milwaukee Daily News, unless such merchant, other person or corporation should advertise in each of said three papers and pay to each of them or to the respective owners or proprietors of them, a corresponding increase over the rates respectively theretofore charged by such other three newspapers respectively, to wit: about twenty-five per cent in excess of what said last mentioned three papers respectively were then charging and had theretofore charged for advertising; but that in case any merchant, other person or corporation should refuse to pay to said the Journal Company the said increased rate established by it as aforesaid for advertising in said the Milwaukee Journal, then and in that case such merchant or other person or corporation so refusing should be at liberty to advertise in any or all of the other of said three newspapers at the rates which had theretofore been charged by said other three newspapers respectively; that a large number of merchants in the city of Milwaukee and other persons were at the time of said combination and agreement, and subsequently thereto, advertising in all of said newspapers, to wit: the Milwaukee Journal, the Evening Wisconsin, the Milwaukee Sentinel and the Milwaukee Daily News, and that the right or privilege to advertise in two or more of said papers was and is considered and regarded by a large number of such merchants and other persons as a valuable right and privilege and one much to be desired; that all or the greater part of the patrons of and persons advertising in said the Milwaukee Journal, were, pursuant to said combination and conspiracy on the part of said Aikens, Huegin and Hoyt, and in furtherance thereof, notified by them of the said agreement, conspiracy and combination between said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt; that many of the patrons and advertisers in said the Milwaukee Journal were induced thereby to withdraw their advertisements therefrom, greatly to the injury of the business and trade of said the Journal Company and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum; that pursuant to said combination, agreement, con-

federation and conspiracy, and in furtherance thereof, said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, did refuse to allow the advertisements of divers merchants and other persons to be inserted in either the Milwaukee Sentinel, the Evening Wisconsin or the Milwaukee Daily News aforesaid, and did prevent the advertisements of divers merchants and other persons from appearing in all or any of said three last-mentioned newspapers because such merchants or other persons so prevented had paid or had agreed to pay to said the Journal Company the said increased rate for advertising established by it as aforesaid; and that by reason of said combination, conspiracy and agreement many merchants in the city of Milwaukee and elsewhere, and other persons, were prevented from advertising in said the Milwaukee Journal, greatly to the injury of the business and trade of said the Journal Company, and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and of each of them, contrary to the statute in such case made and provided, and against the peace and dignity of the State of Wisconsin.

"Wherefore, affiants pray that the said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt be arrested and dealt with according to law."

The complaint was filed with the police court in the city of Milwaukee and such proceedings were thereupon had, based thereon, that the defendants therein named were arrested and produced before such court for a preliminary examination, whereupon a motion was made for their discharge upon the ground that the allegations of the complaint were not sufficient to show that a criminal offense had been committed. The motion was overruled. Thereupon evidence was taken before the court, tending to establish the allegations of the complaint. At the close of the evidence a motion was made to discharge each of the defendants, which was denied. The court then decided upon the evidence that the offense charged in the complaint had been committed, and that there was probable cause for believing the defendants guilty of such offense. Each defendant refused to give bail for his appearance before the municipal court of Milwaukee county for trial, whereupon he was duly committed to the custody of the sheriff of such county to await such trial. A

commitment was delivered to the sheriff, as to each defendant, all being in the same form. The following is one of such commitments:

"IN THE POLICE COURT OF THE CITY OF MILWAUKEE.

STATE OF WISCONSIN, } ss.
Milwaukee County. }

"*The State of Wisconsin to the Sheriff, or his Deputy, or to any Constable or Policeman, and to the Keeper of the Common Jail of said County:*

"WHEREAS, Albert Huegin has this day been brought before the police court of said city, charged on the oath of Lucius W. Nieman and Lloyd T. Boyd with having on or about the fifth day of April, A. D. 1900, at the city and county of Milwaukee, committed the offense of conspiracy to injure.

"And whereas, an examination of the said Albert Huegin has been held before said court, and the said court being satisfied that an offense has been committed as charged in said complaint, and that there is probable cause to believe the prisoner guilty thereof, whereupon the said court did require the said Albert Huegin to recognize with sufficient sureties in the sum of five hundred ($500) dollars, for his appearance before the municipal court of said county, at the present term thereof, for the year 1900, and not depart said court without leave. And the said Albert Huegin having failed to recognize in due form of law.

"Now, therefore, in the name of the State of Wisconsin, you are hereby commanded forthwith to convey and deliver into the custody of the said keeper of the common jail, the body of the said Albert Huegin, and you, the said keeper, are commanded to receive the said Albert Huegin into your custody, in the said jail, and him there safely keep until he shall recognize as aforesaid or shall otherwise be discharged by due course of law.

"Witness, the Honorable Neele B. Neelen, justice of the police court of said city of Milwaukee, this 30th day of June, in the year of our Lord one thousand nine hundred."

Thereafter each defendant, on a petition stating the proceedings to which reference has been made, sued out of the Circuit Court for Milwaukee County a writ of habeas corpus to test the

legality of his detention. The sheriff of the county made due return to each of such writs, justifying the detention by the commitment placed in his hands as before stated.

Albert Huegin, one of the defendants, traversing the return of the sheriff, alleged that the proceedings upon which his detention was based were illegal and void and beyond the jurisdiction of the committing magistrate for the reasons set forth in his petition for the writ. Such reasons were, in substance, that the complaint failed to state facts sufficient to constitute a criminal offense. Melvin A. Hoyt, another of the persons in custody, demurred to the return to his writ, for insufficiency. Andrew J. Aikens interposed a traverse similar to that of defendant Huegin. On the hearing on behalf of defendants Huegin and Aikens, and in support of their pleas to the return of the sheriff, the evidence and proceedings had in the police court were offered and received in evidence. The commitments were also offered and received in evidence. The district attorney then moved the court that James G. Flanders and William H. Austin, attorneys of the court, be allowed to appear as counsel for the sheriff. The motion was denied upon the ground that *habeas corpus* proceedings are criminal in character, or involve an inquiry into a criminal proceeding, and that the duty devolves solely upon the district attorney to represent the state, the real party, in such a matter, the sheriff not being a party to the proceeding at all.

The court then decided that the proceedings which resulted in the several commitments were illegal, because the facts alleged in the complaint did not constitute a criminal offense; that the statute under which the prosecution was commenced covers only cases where the purpose of the combination is to do such an injury that an action at law can be maintained for damages, against the members of the combination, in case its purpose is carried out. An order was accordingly entered to discharge each of the defendants from custody. Such orders are presented here for review by writs of error, as before stated.

After returns were filed to the writs of error issued out of this court, a motion was made on behalf of the sheriff of Milwaukee county for leave to be heard by private counsel, which motion was opposed by the defendants in error.

E. R. HICKS, Atty. Gen.; HOWARD VAN WYCK, Dist. Atty.; A. C. UMBREIT, Asst. Dist. Atty.; WINKLER, FLANDERS, SMITH, BOTTUM & VILAS, and W. H. AUSTIN, for plaintiff in error.

VAN DYKE, VAN DYKE & CARTER, for defendant in error Huegin.

W. H. TIMLIN, for defendaut in error Aikens.

N. S. MURPHEY, for defendant in error Hoyt.

MARSHALL, J. (after stating the facts). Because of the long delay in announcing the decision in this case it is deemed proper to say, as a justification therefor, that the number and importance of the questions involved were such that the case seemed to call for the most careful study by each member of the court which the amplest opportunity therefor would permit, and to require that a decision should be rendered only when it could embody the best judgment of each such member, if that result could be reached within such time as not, by reason of the delay, to materially prejudice the administration of justice. There is room for congratulation that the purpose of the long deliberation upon the case has been accomplished. To circumstances which were unavoidable, preventing that full discharge of official duty, as regards individual study of the case, which was desired prior to settling upon the final conclusions, the delay must be in the main attributed. The questions legitimately discussed by counsel are so numerous that in the preparation of the opinion a choice had to be made between stating mere conclusions with appropriate supporting authorities, or discussing such questions at length. By the former method a brief opinion would have sufficed to cover the case; by the latter a lengthy opinion was unavoidable. The former course would have required but little labor compared with the latter, but it seemed that the careful preparation of the case and presentation of it by numerous and able counsel for the respective parties could not be adequately responded to, so as to fairly indicate the appreciation felt here for the assistance received from such preparation and presentation, otherwise than by a pretty full discussion of each of the points decided which counsel upon either side deemed of sufficient importance to require

them to present for that purpose. Acting upon that conviction we will discuss each of such points with sufficient fullness to satisfy all reasonable expectation and endeavor to make the conclusions reached a definite declaration of the law, so that, in addition to adjudicating the rights of the parties to the suit, the result will be valuable, as regards each point presented, in guiding the courts and the profession in this state in future cases.

Opposition to the motion on behalf of the relator to be heard in this court by private counsel in his behalf, was based on the following grounds: (1) It involves consideration of one of the errors claimed to have been committed by the court below which should only take place upon the consideration of the other errors. (2) The attorney general is required by section 163, Rev. St. 1898, to appear for the state and prosecute or defend all proceedings in the Supreme Court, in which the state is interested or a party, and that precludes appearance by private counsel in criminal proceedings, the law being the same as to the attorney general in the Supreme Court as it is as to the district attorney in the Circuit Court. (3) The sheriff is not a party and has no personal interest in the result of the review of the proceedings called in question by the writs of error. Each of such propositions involves an important question of practice, which is regulated either by statute or by the judicial policy of the state, and has received consideration resulting in the following conclusions.

1. If the sheriff of Milwaukee county by whom the state sued out the writ of error, is a party to the proceedings in this court and in any event is entitled to be heard as such, he can not be denied that right because to allow it would be inconsistent with a ruling of the court below, sought to be reviewed by the writ of error. If he is properly here as a party, obviously, his rights as such can not be jeopardized by any decision made by the court below which is a subject for review on the writ of error. That seems too clear for reasonable controversy. If counsel's position be correct, no person denied the right to be heard in a trial court upon the ground that he is not interested in the controversy, can be heard on appeal from the decision except there be a judgment for costs against him, because recognition here to present his case would be a recognition of his claim that he was

a party to the proceeding in the trial court. We can not sanction that doctrine. The sheriff was the actor in suing out the writ of error. He appears at the bar of the court and asks to be heard by counsel. If he is a party to the proceeding he must be heard regardless of any incidental bearing the decision may have upon any question involved in the review of the proceedings upon the writ. Manifestly, if he was a party in interest in the habeas corpus proceedings, he is a party to the suit commenced in this court by the writ of error to review the result thereof, if he was bound thereby to his injury, to some appreciable degree, either directly and immediately or so that direct injury of some sort may probably come to him therefrom; in short, if he is "a party aggrieved." Our appeal statute on that point (section 3048, Rev. St. 1898) is no broader at most than the common-law rules governing the subject of parties in suits commenced by writs of error, or section 3043, Id. A writ of error lies in favor of him "who is a party to the record;" a man who "is aggrieved by an error in the foundation, proceeding, judgment or execution, in suit," said Justice Grier, in *Bayard* v. *Lombard*, 9 How. 530, 13 L. Ed. 245, quoting from early common law writers. See, also, 7 Enc. Pl. & Prac., p. 856. That the relator here is a party aggrieved within the rule stated it seems is quite clear, but we will refer to the subject more at length in the discussion of the third proposition.

2. The second proposition assumes that proceedings to test the right of a person to his personal liberty are criminal in character and governed by the rule declared in *Biemel* v. *State*, 71 Wis. 444, 37 N. W. 244; *State* v. *Duff*, 83 Wis. 291, 53 N. W. 446, and other cases. Whether habeas corpus proceedings are in their nature civil or criminal we do not deem necessarily material. If the decision were to turn on that question, though, as at present advised, it would result in favor of the proposition that the remedy by habeas corpus is a civil remedy, as contended by the relator. The writ *ad faciendum, subjiciendum, et recipiendum* of the common law was the sole legal remedy of a person wrongfully restrained of his liberty. The purpose of a proceeding instituted by it was not to punish for the wrongful act of restraining him of his liberty, nor did it concern, necessarily, the wrongful

act causing his detention. It was confined to compelling the immediate human instrument of the unlawful restraint to restore his victim to liberty notwithstanding any charge made against him. The case cited to our attention by relator's counsel, *Ex parte Tom Tong*, 108 U. S. 556, 2 Sup. Ct. 871, 27 L. Ed. 826, opinion by Waite, C. J., states briefly and clearly the true nature of such proceedings, as they are uniformly regarded in the books: "The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right of liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody under the criminal process." In a later case, *Cross* v. *Burke*, 146 U. S. 82, 13 Sup. Ct. 22, 36 L. Ed. 896, the court, speaking by Fuller, C. J., said: "It is well settled that a proceeding in *habeas corpus* is a civil and not a criminal proceeding." So the authorities in this state, that it is the policy of the written law that no one but the public prosecutor or his assistant duly appointed shall be permitted to represent the commonwealth in criminal cases against the accused, do not extend to a civil action or proceeding in the nature of a civil suit commenced by the issuance of a writ of *habeas corpus*, because, if for no other reason, it is not a criminal suit. The law that makes it the duty of the district attorney of a county to appear and prosecute or defend all actions, applications or motions, civil or criminal, in the courts of his county wherein the state is interested or a party, except for assault and battery (section 752, Rev. St. 1898), precludes legal services being rendered by way of assisting the district attorney in a civil matter at public

expense. That has often been decided. *McDonald* v. *Milwaukee Co.*, 41 Wis. 642; *Board* v. *Sullivan*, 51 Wis. 115, 8 N. W. 12; *Cutts* v. *Rock Co.*, 58 Wis. 642, 17 N. W. 636; *State* v. *Duff*, 83 Wis. 291, 53 N. W. 446; *Frederick* v. *Douglas Co.*, 96 Wis. 411, 71 N. W. 798. But it has nowhere been decided that the state's attorney, either of the county or the state at large, can not obtain or receive assistance at his own expense or the expense of others in a civil proceeding. In *McDonald* v. *Milwaukee Co.*, *supra*, the sheriff employed counsel to defend against proceedings commenced by writ of *habeas corpus*. He made a claim against the county for his disbursements for such services. The claim was held invalid, because of the duty of the district attorney of the county to attend to such matters as a part of his official duties, made so by section 3433, Rev. St. 1898, which provides that when it appears from the return to a writ of habeas corpus that the person seeking to obtain his liberty is detained upon a criminal accusation, no order shall be made for his discharge until opportunity shall be given to the district attorney of the county to be heard, if to be found within the county; and because such provision is exclusive of the right of the sheriff to employ counsel at public expense. The case must be read in the light of what was under consideration, that is, the right of the sheriff to employ counsel at public expense. There is nothing in that to militate against a person other than the district attorney standing in court as the representative of the people in a civil action by consent of the public attorney. No judicial policy with which we are familiar is thereby violated, nor any constitutional right. Such a representative can not claim compensation for his services except as against the individual employing him. That is as far as the decisions of this court go. No reason is perceived why a reputable attorney in a mere civil action can not be heard in court on behalf of the state by permission of the officer whose duty it is to stand responsible for the due protection of the public interests, without the violation of any right secured by the Constitution or any law, to the person standing in the capacity of an adversary to the public in the proceedings. It has been the universal practice in this state to permit private counsel in this particular class of cases, as is abundantly shown

by the decisions cited by counsel for the relator. *In re Booth*, 3 Wis. 1; *In re Falvey*, 7 Wis. 630; *In re Pierce*, 44 Wis. 411; *In re Eldred*, 46 Wis. 530, 1 N. W. 175; *State* v. *Noyes*, 87 Wis. 340, 58 N. W. 386, 27 L. R. A. 776; *State* v. *Ryan*, 70 Wis. 676, 36 N. W. 823; *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299.

3. What has been said goes upon the theory that the state is the only party interested in habeas corpus proceedings adversely to the petitioner, when the person alleged to be wrongfully restrained of his liberty is detained upon a criminal charge; but, as indicated in the brief discussion of the first proposition, we can not agree with the learned counsel for defendants in error that the respondent in such a proceeding is not a party thereto. The issuance of a writ of habeas corpus is to all intents and purposes the commencement of a civil action, not an action strictly so called, within the meaning of section 2629, Rev. St., 1898, to be commenced by the issue of a formal summons, but in the same sense that proceedings to enforce the remedy by mandamus and proceedings by writ of error are civil suits, as has been repeatedly held. The issuance of the writ is the commencement of a proceeding in a court of justice for the enforcement or protection of a right within the meaning of section 2595, Id. In *Ex parte Tom Tong*, supra, the issuance of the writ of *habeas corpus* was denominated the commencement of a suit to enforce a civil right. That was said in the same sense that this court declared, in *Paine* v. *Chase*, 14 Wis. 653, that the issuance of a writ of error is the commencement of an original suit and regarded as the commencement of an action, and in the same sense that it was said, in *State* v. *Jennings*, 56 Wis. 113, 14 N. W. 28, that a proceeding by *mandamus* is essentially a suit. True, the issuance of either of the writs mentioned, as before indicated, is not the commencement of an action strictly so-called within the meaning of the code, because it is there declared that all remedies in courts of justice are divided into actions and special proceedings (section 2594, Rev. St. 1898) and that a civil action shall be commenced by the service of a summons (Sec. 2629, Id.). But the grant of power to circuit courts to issue writs of *habeas corpus* and *mandamus*, among other common-

law writs, contemplated their use for the purposes they were devoted to before the adoption of the code, *i. e.*, for the commencement of suits within the broad meaning of the term; and their essential character in that regard has not been and can not be changed by any legislative enactment. Whether the issuance of such a writ be called by the code the commencement of a civil action or a special proceeding, it is to all intents and purposes the commencement of a suit and the final determination thereof is a final judgment in a suit or proceeding in the nature of a civil action. In *Holmes* v. *Jennison*, 14 Pet. 540, 564, 10 L. Ed. 591, Chief Justice Taney said: "If a party is unlawfully imprisoned, the writ of *habeas corpus* is his appropriate legal remedy. It is his suit in court to recover his liberty." The court further said, in effect, that the term "proceedings in a suit" and the term "proceedings in an action" are synonymous; that when a law confers, in general terms, jurisdiction upon an Appellate Court to review on writ of error the final judgment in any suit, it includes jurisdiction to review the final determination in *habeas corpus* proceedings.

It follows from what has been said that the *habeas corpus* proceedings in question must be regarded as a civil action—an ordinary proceeding in a court of justice to enforce a personal right—within the meaning of section 2595, Rev. St. 1898, which says that such a proceeding is an action. That is in harmony with the decisions of this court to the effect that, without any statutory regulations, a writ of error lies to review a final determination on *habeas corpus* (*State* v. *Smith*, 65 Wis. 93, 26 N. W. 258), and with *State* v. *Kemp*, 17 Wis. 669, and cases which followed it, denying to the state the use of the writ of error in criminal cases. That rule was one of judicial policy only, in a field where it was supposed the court was free to establish the law for this state, and has been abrogated by statute (section 3043, Rev. St. 1898). This was the suit of the defendants in error and their only adequate remedy to vindicate their right of personal liberty. The immediate instrument of the wrong complained of was the sheriff of Milwaukee county. The petitioners for the writ sought to establish their right to personal freedom notwithstanding the commitment under which the sheriff justified his

conduct. They were, to all intents and purposes, plaintiffs, within the meaning of section 2601, Id., regardless of the name by which such parties are commonly known. The adverse party on the record was the sheriff. He was to all intents and purposes the defendant in the proceeding, regardless of the name by which such a party is commonly known. The statute (section 2595, Id.) says: "An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right," and unless the state is the plaintiff and the proceeding is against the defendant for the punishment of a criminal offense, it is a civil action, and every person necessary to a complete determination of the controversy as against the plaintiff is a necessary party and an interested defendant. Section 2603, Id. The term "party to a suit (or action)" applies as properly to persons seeking, by writ of *habeas corpus*, to vindicate their right to personal freedom, and to the adverse party who is restraining them of it, as to contestants upon the record in any other suit. The former are persons seeking to establish their legal rights; the latter, persons on whom it is sought to impose an immediate duty or liability to recognize such rights. 15 Enc. Pl. & Prac., p. 463.

Upon the district attorney was imposed the duty of guarding the interest of the state, but he had no duty to perform by virtue of his office for the sheriff as an individual. The latter was a party, and an interested party, because he was charged with being guilty of the particular wrong which it was the purpose of the writ to redress; hence the law must be construed as according to him the same right as to any other party to be heard by counsel. True, as counsel for defendant in error say, section 3436, Rev. St. 1898, protected the sheriff from any liability for obeying the order discharging, or directing a discharge of the prisoners, but there is no statute protecting him from liability for the wrongful imprisonment.

We are not unmindful that there are decisions to the effect that an adjudication in *habeas corpus* proceedings is not binding in a subsequent suit to vindicate the same right between the parties, or a suit between such parties where same question is material. *In re Quinn*, 2 App. Div. 103, 37 N. Y. Supp. 534; *People*

v. *Brady*, 56 N. Y. 182; Hurd, Hab. Corp., Sec. 386. That doctrine was based on a supposed common law rule that a decision on *habeas corpus* is not subject to review on appeal or writ of error. Such doctrine has been modified by judicial policy in many jurisdictions and in others displaced by statute, as it has been in this state, so far as it before prevailed here. Church, Hab. Corp. (2d Ed.), p. 577; *Ex parte Cuddy* (C. C.), 40 Fed. 62; *Perry* v. *McLendon*, 62 Ga. 598; *Ex parte Jilz*, 64 Mo. 205. Section 3437, Rev. St. 1898, which is the same as the Missouri statute that governed *Ex parte Jilz*, expressly changed the common law rule as regards the effect of a final determination of a *habeas corpus* proceeding. It expressly prohibits the commencement of a second *habeas corpus* proceeding for the same cause, while the determination in the first remains unreversed. That and the remedy for a review of such a final determination by writ of error sued out by either party to the writ, which is given by our statute (section 3043, Id.), effectually changed the common law rule, so that the doctrine of *res adjudicata* has now the same applicability to *habeas corpus* proceedings as to other suits.

We have not overlooked the suggestion that the doctrine that ruled *McCarty* v. *Board*, 61 Wis. 1, 20 N. W. 654; *People* v. *Lawrence*, 107 N. Y. 607, 15 N. E. 187, and *Bryant* v. *Thompson*, 128 N. Y. 427, 28 N. E. 522, and some other cases, applies to the status of a person defending against the charge in *habeas corpus* proceedings of unlawfully restraining another of his liberty. That doctrine is that a person or tribunal, exercising judicial functions between parties, is not a party to a proceeding to challenge a decision made by him so that he may himself take an appeal or be a party to an appeal involving such decision. In *McCarty* v. *Board*, a decision of the board of supervisors had been reversed on writ of certiorari and the board attempted to appeal In *People* v. *Lawrence* a judge whose decision of a matter had been reversed on *certiorari* attempted to appeal. The mere statement of the circumstances under which courts have applied the doctrine referred to is sufficient to show that it has no application here. If the court that heard the *habeas corpus* proceedings or the examining magistrate were here claiming to be a party to the writ of error, and demanding an opportunity to be heard, the

cases cited by counsel would be in point. It has been repeatedly held that a person or body not acting in a judicial capacity, but a party to a judicial proceeding as a representative of the public, even though having no pecuniary interest in the litigation, has an appealable interest in a judgment adverse to his or their authority. *State* v. *Wolfrom*, 25 Wis. 468; *Moede* v. *City of Stearns*, 43 Minn. 312, 45 N. W. 435; *People* v. *Jones*, 110 N. Y. 507, 18 N. E. 432.

What has been said, it seems, covers every suggestion that has been made why the sheriff of Milwaukee county was not entitled to be heard by counsel in the Circuit Court in the *habeas corpus* proceedings and why he is not entitled to be heard in this court as a party to the writ of error. He was and is a party in every sense of the word, and is, so far as concerns himself, entitled to be heard by counsel of his own choosing.

The first question on the merits is, does the warrant of commitment state any offense known to the laws of this state? That involves an inquiry into whether a statement of the facts—necessary to the jurisdiction of the offense, if there be one, and in substance that the person named in the commitment on a particular day named, was brought before the court charged on oath with committing the offense of conspiring to injure, and that such court, from the examination had, was satisfied that the offense charged had been committed and that there was reasonable ground to believe suchpers on guilty thereof—shows an adequate cause for holding such person for trial. Defendants in error claim that it does not, because it fails to show, in detail, the existence of the facts necessary to constitute the offense of conspiring to injure, with some approach at least to the technical accuracy of an indictment at common law, so as to identify the alleged wrongful conduct with either the common-law offense of conspiracy or the offense stated in section 4466a, Rev. St. 1898. Counsel do not state the rule of certainty, which they contend the commitment should be tested by, in the exact language we have used, but it seems from their reasoning that what has been said fairly expresses their contention. They say the warrant was fatally defective because it did not show with whom the person named therein conspired, nor the fact that there was more than

one guilty participant so as to make a combination possible; that it failed to state the facts constituting the offense; that it omitted to recite that the alleged combination was entered into for the purpose of willfully or maliciously injuring another; that it did not literally follow the statute; and that it did not conclude in the form of the statute in such case made and provided.

We do not understand that any such degree of certainty in a commitment as that contended for is required. Authorities may be found here and there tending to support counsel's contention; for example *Ex parte Branigan*, 19 Cal. 133, cited to our attention, which is contrary to later decisions made by that court and out of harmony with the current of authority, as we shall show. The general rule is that it is sufficient, in a commitment for trial, to state with reasonable clearness the nature of the offense with which the person is charged, and conclusions of fact in general language, justifying his detention on such charge; that a statement of the specific facts in detail, on which the charge is based, is unnecessary. A multitude of authorities to that effect might be cited, commencing with the older books and coming down to date. In *Collins* v. *Brackett*, 34 Minn. 339, 25 N. W. 708, the offense charged was one created by statute. The particular section was not referred to, nor were the facts essential to the offense stated in detail; but there was sufficient in the commitment to clearly indicate the kind of offense for which the accused was held to answer, and sufficient to indicate by reasonable inference the statute creating the offense. The court said that it satisfied the rule of convenient certainty by which such instruments are to be tested; that it pointed by reasonable inference to the statute creating the offense, and therefore, by reasonable inference, stated everything necessary to the offense which was not specifically set out. "It is not necessary," said the court, "in such an instrument, to set forth the facts constituting the offense particularly. * * * It is impossible to construe the commitment as referring to any other than the statutory offense. While it does not set forth every ingredient in such offense, it contains specifications enough to indicate the general nature of the crime charged, and that is sufficient." In *State* v. *Everett*, Dud. (S. C.) 295, a case often referred to by courts and text writers, the com-

mitment under consideration merely described the offense as the crime of larceny, no fact being stated essential to that offense; yet it was held, on *habeas corpus*, that the commitment was sufficiently certain to justify the officer in detaining the prisoner; that it is a great mistake to suppose that such a warrant need enumerate any fact or circumstance accompanying the offense, the nature of which is set forth therein; that it is sufficient to merely state the offense with convenient certainty; that it should not be for felony generally, but that the instrument should indicate the special nature of the felony. That decision is in harmony with the authorities generally, though directly contrary to *Ex parte Branigan, supra*, which supports counsel's views as we have before indicated. All the cases cited, it will be found, declare for the rule of convenient certainty merely. But while the California case regards that degree, as it seems, to call for certainty to a certain intent in particular, it is obvious that convenient certainty is satisfied where language is used which, by reasonable inference, points with reasonable clearness to the particular subject intended to be expressed. The doctrine which we say generally prevails was followed in later California cases. *Ex parte Moan*, 65 Cal. 216, 3 Pac. 644; *Ex parte Walpole*, 85 Cal. 362, 24 Pac. 657. True, reference is there made to a form for commitment prescribed by statute, which is however substantially identical with one which, it is said in section 4774, Rev. St. 1898, may be used. The California Court, in the early case, while reaching a conclusion directly opposite to that declared in *Collins* v. *Brackett, supra*, and the cases to which we will presently refer, referred to the same authorities for support, *i. e.*, 1 Chit. Cr. Law, 109, and 2 Hale, P. C. 122. A careful reading of those authorities discloses the fact that what is said about the higher degree of certainty is merely advisory. When it comes to the necessities of the case the lower rule is stated with many illustrations: For example, quoting from 1 Chit. Cr. Law, 111: "It is necessary to set forth the particular species of crime * * * with convenient certainty. * * * If the commitment be for felony it ought not to be generally for felony, but it must contain the special nature of the felon briefly, as for felony of the death of J. S. or for burglary in breaking the

house of J. S., etc. But though it was formerly thought otherwise, it appears now to be settled, that a commitment for high treason, or suspicion of treason generally, or for treasonable practices, without stating any overt act or other particulars of the crime is sufficient. And * * * there are precedents of commitment for felony in general in good authors, without stating the specific accusation. So in Wilkes' Case, 2 Wils. 153–159, a commitment for publishing 'a most infamous and seditious libel entitled "The North Britons, Number 45," tending to inflame the minds and alienate the affection of the people from his majesty, and to excite them to traitorous insurrections against the government,' was held sufficient, though it was urged that the libel ought to have been set forth in order that the court, on a *habeas corpus*, might be able to fix the quantum of bail. So it has been held that a commitment which charged the party generally with insulting justices of the peace in the execution of their office, without stating what he said or did, is sufficient. It is, however, in general advisable to describe the offense concisely but in substance as an indictment." There is obviously a wide difference between what is advisable and what is necessary in such cases. It would be a mistake to adjudicate rights upon the basis of what is merely advisable, losing sight of the necessities of the case. We cite the following additional authorities sustaining the view expressed: *Ex parte Howard*, 26 Vt. 205; *People* v. *Johnson*, 110 N. Y. 134, 17 N. E. 684; *Ex parte Willoughby*, 14 Nev. 451; *People* v. *Gray*, 67 How. Prac. 456; *State* v. *Killet*, 2 Bailey, 289; *In re Kelly* (C. C.), 46 Fed. 653; 4 Enc. Pl. & Prac., pp. 577, 578, and cases cited.

It follows from what has been said that if the general statement in the commitment, in its literal sense or by reasonable inference, points clearly to the offense intended to be charged, and such offense, so called, is one in fact, for which an accused person can properly be held, the commitment was a complete defense to the *habeas corpus* suit till overturned by some defect of a jurisdictional nature in the proceedings upon which it was based, unless it was fatally defective by reason of the statute (section 4774, Rev. St. 1898). As we have seen, the description of an offense well known to the law, by its generic name, as the

offense of arson, burglary, larceny or murder, by reasonable inference indicates the existence of all the essentials of the offense. That is just as true of a mere statutory offense when it has a name which individualizes it and points with reasonable certainty to the statute on the subject. *In re Kelly*, *Collins* v. *Brackett*, and *People* v. *Johnson*, *supra*, fully cover that question. Applying that rule to the commitment in question, no difficulty whatever is perceived. It says the accused was charged with having committed on a day named, the offense of conspiring to injure. The use of the term "conspiring" suggests without possibility of doubt that two or more persons were concerned in the offense. The only law in this state making a mere agreement between two persons to do an act injurious to another under any circumstances an offense is section 4466a, Rev. St. 1898. Therefore the language, "the offense of conspiring to injure," with reasonable clearness refers to such statute. It includes by inference, a statement of all the facts necessary to satisfy the calls of the statute. The statement of the name of the crime states with convenient certainty the nature thereof and of course suggests the existence of facts necessary thereto. The general statement includes the details, if such general statement is sufficient to suggest them with reasonable clearness. A commitment so drawn as to satisfy the degree of certainty thus indicated is sufficiently precise to satisfy every part of it and is according to the prevailing rule on the subject.

The idea advanced by counsel that the commitment is fatally defective for want of the preliminary words, "against the form of the statute in that case made and provided," can hardly be considered as being seriously urged. There was a time when substance in judicial proceedings was in some respects sacrificed to mere form, or when mere form was considered to be as essential as substance; but in the progress of events the law has developed to a point so far away from such notions that they are regarded as obsolete. So long as the commitment shows that the accused was held for trial for a criminal offense, the unavoidable inference is that the act charged took place, if at all, contrary to law. Any mere formal statement of that, as a concluding phrase in the commitment, was wholly unnecessary. This court, in

Nichols v. *State*, 35 Wis. 308, characterized a useless expression, similar to the one in question, as a mere rhetorical flourish, adding nothing to the substance of the instrument, and as wholly unnecessary in the absence of a constitutional or statutory mandate making it so. That was affirmed in *Murphy* v. *State*, 108 Wis. 111, 83 N. W. 1112. There is no such mandate in the way as to the matter under consideration.

A suggestion is made by one of the learned counsel that the commitment is void because it does not follow strictly the form prescribed by statute, and another says there is no statutory commitment for such a case. The first suggestion will be considered without deciding that the officer in this case was required to use the particular form referred to. Section 4740, Rev. St. 1898, requires a warrant to contain the substance of the complaint on which it is issued, and section 4774, Id., prescribes a form of commitment for trial that "may be used," which indicates that the offense should be stated "as in the warrant." The rule is that where a form is prescribed by statute it must be strictly followed. That has been held to mean, followed with almost technical accuracy where the language of the statute so indicates. *Keniston* v. *Chesly*, 32 N. H. 564. But section 4774 does not so indicate, unless we read "may" as "must" or "shall" and give thereto its full meaning down to immaterial details. Nothing of the kind, we think, was intended. *Streeter* v. *Frank*, 3 Pin. 386, did not go that far. It dealt with a material omission from a statutory form. Section 4774 is open to a reasonable construction, requiring only that the form be followed strictly as to the substance of things, not literally. There is a difference between following a form literally and following it strictly. The former goes to minuteness of detail in mere matters of form, while the latter may be satisfied by the essential elements. In *Streeter* v. *Frank* one of those elements was omitted. The words in the form under discussion, "state the offense as in the warrant," taken in connection with the requirement that the warrant shall recite the substance of the complaint, mean no more than that it shall state the same offense as the one named in the complaint with sufficient accuracy that its identity will appear with convenient certainty. What has been said on another branch of the

case as to such degree need not be repeated. The complaint charged in general language, or attempted to do so, and also by all the particulars, the commission of the offense to injure, going further in such particular than the specific offense as created or declared in section 4466a, though it is plain that such statute was what the complainant had in mind. The substance of the complaint was that the accused were guilty of having committed, on a day named, the offense of conspiring to injure, and that was substantially carried into the commitments.

If we were to hold that the commitments do not show with convenient certainty, within the rules above stated, that the defendants in error were imprisoned to await their trial upon a charge of having violated section 4466a, Rev. St. 1898, the Circuit Court none the less erred in discharging them—if the complaint upon which they were arrested charged an offense known to the law, and the record of the examination which the court had properly brought to its attention showed that there was evidence tending to support the charge on these two essentials: First, that the offense was committed; second, that there was probable cause for believing that the accused were guilty thereof—regardless of whether the decision of those questions, or either of them, by the committing magistrate, was right or wrong. That was substantially the rule at common law, and it was preserved by the constitutional grant of power to circuit courts to issue writs of *habeas corpus*, especially since there is no statute in any way restricting the jurisdiction of such courts in that regard. So far as the statutes of this state treat the subject they confirm and broaden the common-law rule. Express provision is made for bringing to the notice of the court, in a *habeas corpus* suit to vindicate the right of a prisoner, detained for trial upon a criminal charge, to his personal liberty, the record of the examination including the evidence taken, and it is made his duty to examine such evidence, and, if thereby it appear to him that the accused is guilty of the offense, to commit him for trial or admit him to bail regardless of any irregularity in the original commitment. Section 3429, Rev. St. 1898; *State* v. *Bloom*, 17 Wis. 521. It is also the duty of the court on *habeas corpus* to examine the com-

plaint, and discharge the prisoner if it does not state an offense known to the law; and to examine the evidence and treat the decision of the examining magistrate as outside of his jurisdiction if no competent evidence is found upon which such magistrate could properly have acted. That is well settled by the authorities. Church,Hab. Corp., Secs. 231, 236; *In re Wadge*, 21 Blatchf. 300, 16 Fed. 332; *In re Louis Oteiza y Cortes*, 136 U. S. 330, 10 Sup. Ct. 1031, 34 L. Ed. 464; *Nishimura Ekiu* v. *U. S.*, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; *Ex parte Bollman*, 4 Cranch, 75, 125, 2 L. Ed. 554. Whatever conflict apparently exists on this question in the books will be found on careful examination not to be a conflict in fact, but is explainable by reference to statutory regulations. We have no statutory regulations in conflict therewith, but on the contrary the statutes of this state substantially declare the common-law rule. True, at common law the writ of *habeas corpus* reached only jurisdictional defects; but, as the term is rightly understood, it goes further than counsel for plaintiffs in error seem to concede. Some courts use the term in the restricted sense of jurisdiction of the person and of the subject-matter, while others, and those it is believed holding the correct doctrine, extend it to include excess of jurisdiction, treating a decision—other than one upon the trial of an issue—that a complaint is sufficient when it does not state any offense known to the law, or one that the essential facts exist warranting the commitment of a person for trial on a criminal charge, where there is no competent evidence for the judgment of an examining magistrate to reasonably act upon, as on the same basis as any other jurisdictional defect in the proceeding. That was early declared as the common-law doctrine and the one to be followed where there is no statute affecting the subject otherwise. *Ex parte Bollman*, *supra*. Chief Justice Marshall there said, after recognizing the distinction between imprisonment upon a final judgment and detention under a commitment to stand trial: "It is unimportant whether the commitment be regular in point of form or not; for this court, having gone into an examination of the evidence upon which the commitment was grounded, will proceed to do that which the court below ought to have done." Page 114, 4 Cranch, and

page 567, 2 L. Ed. "This having been a mere inquiry, which, without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is, whether the accused shall be discharged or held for trial. * * * 'If,' says a very learned and accurate commentator, 'upon this inquiry it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him. Otherwise he must either be committed to prison or give bail.'" Pages 124, 125, 4 Cranch, and page 570, 2 L. Ed. That declaration has always been adhered to by the federal courts and followed generally by all courts where jurisdiction in *habeas corpus* proceedings, or the practice therein, is not otherwise regulated by statute.

There is no need to go further to demonstrate that the common-law office of the writ of *habeas corpus*, as it came to us and has been preserved by our state constitution, is as indicated by the decision referred to. While it is true that such writ never takes the place of a writ of error, and is confined to jurisdictional defects, when it is resorted to merely for the purpose of liberating a person detained in custody to await his trial on a charge of being guilty of a criminal offense, the questions of whether there was any evidence for the magistrate to act upon and whether the complaint charges any offense known to the law are jurisdictional matters. The reviewing court, in the exercise of its function, must necessarily pass upon and reverse or affirm the decision of the committing magistrate, if such matters are properly presented for its consideration, according to its determination thereof, and in doing so it does not go beyond jurisdictional defects. It can examine the evidence only sufficiently to discover whether there was any substantial ground for the exercise of judgment by the committing magistrate. It can not go beyond that and weigh the evidence. It can say whether the complaint will admit of a construction charging a criminal offense, or whether the evidence rendered the charge against the prisoner within reasonable probabilities. That is all. When it has discovered that there was competent evidence for the judicial mind of the examining magistrate to act upon in determining

the existence of the essential facts, it has reached the limit of its jurisdiction on that point. If the examining magistrate acts without evidence, he exceeds his jurisdiction; but any act, upon evidence worthy of consideration in any aspect, is as well within his jurisdiction when he decides wrong as when he decides right.

Counsel for plaintiff in error cite to our attention a large number of cases to support their contention that the Circuit Court had no jurisdiction to review the evidence, many of which are cases decided by this court. We have taken time to examine each of such cases and are unable to discover that they furnish any support for counsel's position. For example, *Ex parte Jones* (C. C.), 96 Fed. 200, one of the significant cases referred to, states the rule in the syllabus, which is fully borne out by the opinion, thus: "The sufficiency of the evidence on which an accused was committed by a magistrate is not open to review in a proceeding by *habeas corpus*, but where, although there was evidence of the commission of the offense, there was no competent evidence even tending to incriminate the person charged, he should be discharged on *habeas corpus*." The concluding language of the opinion is as follows:

"It is true that there was evidence before the commissioner tending to show that the offense charged had been committed by some one, but a careful examination discloses no legal evidence on which the commissioner could exercise his judgment in holding the petitioner for trial. An order will be made discharging the petitioner." The decisions of this court cited, in the main, refer to the scope of the jurisdiction of a court in reviewing the final judgment of another court upon writ of *certiorari* or *habeas corpus*. Manifestly, they do not touch the question here under discussion. Neither a writ of *certiorari* to review a final judgment of a court upon a trial, nor a writ of *habeas corpus* for that purpose, reaches the evidence. That is undoubtedly true. No common-law rule is better settled than that, while the contrary is just as well settled as regards the functions of a writ of *habeas corpus* in testing the legality of a commitment for trial for a criminal offense.

True, as counsel say, the expression has often been used by this court that upon *habeas corpus* proceedings only jurisdictional

errors can be considered, and that has been used without qualification and in a way to indicate—to a person who has not in mind the distinction between jurisdiction for the trial and determination of a cause, and jurisdiction to hold a judicial inquiry to determine whether a prosecution shall be instituted—that insufficiency of evidence, no matter how great, can not be considered, because, the court having jurisdiction of the subject-matter and the person, a decision upon insufficient evidence or without any evidence is judicial or mere error, not jurisdictional error. What the court said in each one of the cases referred to was correctly said as applied to the case. The following are some of the cases: *In re Milburn*, 59 Wis. 34, 17 N. W. 965; *Wright* v. *Wright*, 74 Wis. 439, 43 N. W. 145; *In re Graham*, 76 Wis. 366, 44 N. W. 1105; *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; *In re Meggett*, 105 Wis. 291, 81 N. W. 419; *In re Pikulik*, 81 Wis. 158, 51 N. W. 261; *In re French*, 81 Wis. 597, 51 N. W. 960; *In re Eckart*, 85 Wis. 681, 56 N. W. 375. They all follow the well-known rule that where there is jurisdiction to try and determine an issue, there is jurisdiction to commit error to the extent of deciding the ultimate fact involved without competent evidence tending to support it, and that the error can only be corrected upon writ of error or appeal where one is allowed; that the writ of *habeas corpus* or writ of *certiorari* can not reach the mischief. But a proceeding before an examining magistrate is not a judicial trial. It is a mere judicial inquiry, as before indicated, for the purpose of determining whether an offense has been committed and there is a probability that the accused is guilty thereof and should be placed on trial therefor. No plea or issue is necessary. No jury is demandable or proper. The doctrine of *res adjudicata* does not apply so that the result of one inquiry will preclude another. It is a proceeding that was unknown to the common law,—a mere statutory creation, a personal privilege which the accused must be accorded unless he waives it. Being statutory and special, evidence tending to establish the facts justifying a commitment or holding to bail for trial, is jurisdictional the same as any other statutory essential. The statute awarding the privilege provides that the examining magistrate shall act, in determining the facts, upon evidence;

and that contemplates that there must be evidence, and competent evidence, tending to establish the facts. It is jurisdictional in the same sense that the production of some competent evidence before a quasi judicial body, authorized by statute to act only upon evidence, is jurisdictional. The rule in such cases is that a clear violation of law in doing those things that are within the scope of the power of the officer or body to do is jurisdictional error. *State* v. *Whitford*, 54 Wis. 150, 11 N. W. 424; *State* v. *Dodge Co.*, 56 Wis. 79, 13 N. W. 680; *State* v. *Lawler*, 103 Wis. 460, 79 N. W. 777. For further authorities to support the views here expressed, see Church, Hab. Corp., §§ 237–247; *People* v. *Martin*, 1 Parker, Cr. R. 187; *In re Snell*, 31 Minn. 110, 16 N. W. 692; *In re Hardigan*, 57 Vt. 100; *In re Simon* (Sup.) 13 N. Y. Supp. 399; *State* v. *Hayden*, 35 Minn. 283, 28 N. W. 659; *People* v. *New York Catholic Protectory*, 106 N. Y. 604, 13 N. E. 435; *Ex parte Becker*, 86 Cal. 402, 25 Pac. 9; *Ex parte Willoughby*, 14 Nev. 451; *Jones* v. *Darnell*, 103 Ind. 569, 2 N. E. 229.

Some writers who have favored the profession with text books in recent years, speak of this doctrine as a departure from the common law, through a failure to distinguish between a judicial determination according to the course of the common law and a mere statutory proceeding which, though judicial, is not final in any sense, and is not an action, but a proceeding preliminary to an action. The misconception referred to is very marked in the work of an able writer who cites *State* v. *Noyes*, 87 Wis. 340, 58 N. W. 386, 27 L. R. A. 776, to support a suggestion that this court has not departed from the general rule as to the review of judgments on *habeas corpus* in the treatment of the scope of the writ as regards reaching behind the determination of an examining magistrate. That case did not deal with anything but the general rule, that only jurisdictional defects can be reviewed on *habeas corpus*, and the one that a *de facto* judicial officer or body has the same jurisdiction as any other as regards collateral attack. The case is in harmony with the idea that some evidence is necessary to preclude successful collateral attack upon an examining magistrate's conclusion because that is a statutory requisite thereto.

Independently of the common law rule it has been repeatedly

held, in states having statutes similar to ours, that they contemplate the examination of the proceedings before the committing magistrate, where properly brought to the attention of the court on *habeas corpus* proceedings, so far as necessary to determine whether the magistrate acted upon competent evidence tending to establish the facts and also the introduction of new evidence on issue joined as provided. *People* v. *New York Catholic Protectory, supra; People* v. *Richardson*, 13 How. Prac. 92; *In re Henry*, 13 Misc. Rep. 734, 35 N. Y. Supp. 210; *People* v. *Tompkins*, 1 Parker, Cr. R. 224. In the report of *People* v. *Martin*, *supra*, there is a full review of American and English authorities, and as a result it is said, reading from the syllabus: "In criminal cases where an indictment has been found the court, upon *habeas corpus*, can not go behind the indictment because there are no means of ascertaining upon what it was found. But on a commitment before indictment the whole question of guilt or innocence is open for examination on the return to the writ of *habeas corpus*, and the inquiry is not necessarily confined to an examination of the original depositions. In such cases, under our Revised Statutes, the proceedings on *habeas corpus* are in the nature of an appeal from the decision of the committing magistrate." It is not to be understood by that language that the court held that, on such appeal, so called, the court could go further in reviewing the decision of the committing magistrate on the evidence on which he acted than to determine whether it furnished some reasonable ground for a decision. Church, in his work on *Habeas Corpus*, expresses the view that such statutes as those in New York and in this state are mere declarations of the common law. He is borne out by the holdings of the New York court, but we need not discuss that subject here. It is quite clear here, though, that chapter 147, Rev. St. 1898, was intended to cover the entire field of practice in *habeas corpus* suits so far as relates to original proceedings. The scope of section 3425, *Id.*, is broad enough, if a statute was required on that question, to enable the petitioner for writ of *habeas corpus*, by his petition, to bring to the attention of the court all the proceedings before the committing magistrate or by presenting the same as evidence in support of his

answer to the return, where such answer contains allegations rendering such proof competent. Sections 3427, *Id.*, precludes examination into the proceedings upon which the determination of the court was had in committing the person, only when such detention is upon a final judgment or order. That manifestly does not include a determination of a mere judicial inquiry. Section 3429, *Id.*, refers to the former section and contemplates the examination of evidence produced before the examining magistrate where it is properly brought to the attention of the court.

Sufficient has been said to demonstrate that counsel for plaintiff in error have confused the scope of a *habeas corpus* suit calling in question the validity of a final judgment or order and the scope thereof as to reaching the proceedings of a committing magistrate. It is not understood, it seems, that failure to comply with the statute requiring such magistrate, in his inquiry, to act upon evidence, is not an error committed in acting within his jurisdiction, as is the act of entering a judgment, by a court, upon the trial of an issue, without competent evidence to warrant it,—but is error in going beyond his jurisdiction. The general rule invoked by counsel is as claimed, but the application of it contended for is wrong.

The point made by counsel for plaintiff in error that the Circuit Court erred in going beyond the warrant of commitment and examining the complaint, and that it would have been error to have taken into consideration the evidence taken before the committing magistrate, which was properly produced as part of the *habeas corpus* proceedings, can not be sustained. The position of counsel for defendants in error, that the question of whether the complaint states any crime known to the law, and that of whether there was any evidence tending to show the facts essential to the detention of the accused for trial upon the charge, were open, is approved.

The doctrine is invoked by the learned counsel for defendant in error Melvin A. Hoyt, that "where concert of action is necessary to the offense, conspiracy does not lie." That principle is familiar, but its application, as its language clearly indicates, is necessarily confined within very narrow limits. It does not

reach a situation where mere combination to effect an object is itself criminal and not merged in a crime of higher degree, else the absurd result would follow that the offense of conspiracy would be impossible either at common law or under the statute. The rule applies where the immediate effect or the consummation of the act in view, which is the gist of the offense, reaches only the participants therein, and is in such close connection with a major wrong as to be inseparable from it, as for instance, in the offense of adultery, or bigamy, or incest, or dueling. That illustration, in a different way, is given at section 1339, Whart. Cr. Law, which is cited to our attention and relied upon by counsel, but which, as it seems, is wholly misunderstood in urging it upon the attention of the court as applicable to the facts of this case. Where an act is an offense, as that of adultery, a crime, it can not be made a different offense because of the circumstance that in the conception of it a precedent agreement by two persons is necessary; but if the act is preceded by an agreement between several persons to cause the offense to be committed by others, or between a member of the combination and a person outside of it, the gist of the precedent concurrence is the wrongful agreement; that of the object thereof is the adulterous act. In the latter there is the element of *concursus necessarius*—the concurrence in the ultimate act constituting the crime, precluding its being prosecuted as the crime of conspiracy. In the former there is also the element of *concursus necessarius* in that at least two persons are necessary to a combination or agreement. But there is also the element of *concursus facultativus*, making it a distinct offense. Those concerting to cause the crime to be committed may be prosecuted for the offense of conspiracy, and those guilty of the act the combination was formed to bring about may be prosecuted for that, though the effect thereof be to prosecute one of the parties for both offenses. In the latter the plurality of agents, really, as Mr. Wharton says, in effect, is in aid of the conception to commit the ultimate act of adultery. In the former the plurality of agents is as necessary to the full conception of the offense so as to preclude the possibility of failure thereof, as to the consummation of the offense itself. In the one, concert is essential to the act and a necessary part of

it; in the other, concert, itself an offense, is a mere aid to the act which is the ultimate purpose thereof—a purpose that is susceptible of being abetted without, though not as effectually as with, the specific, independent act of combination. It is only where the concurrence to commit an offense and the consummated act are so connected that they really constitute one act, every element inculpatory of each party, so that separation of the whole into its constituent elements and a prosecution for it as a distinct offense would place the parties twice in jeopardy, that the rule applies.

Shannon v. *Com.*, 14 Pa. 226, and *Miles* v. *State*, 58 Ala. 390, cited by counsel to sustain his view, are in harmony with what has been said. In the first case cited the rule is stated thus: "Where concert is part of a criminal act, it is not a subject of indictment as a conspiracy to commit the act." That is, as applied to this case, if the mere infliction of an injury to the Journal Company in its business was a criminal act, and obviously it was not such, the infliction thereof by two persons acting in concert and by mental concurrence could not be prosecuted as a conspiracy. But, as said in *Shannon* v. *Com.*, where an act is an integral offense and not an integrant part of one, a guilty participant may be prosecuted for both. The term "act" as there used manifestly refers to an act which is illegal in the sense that it is wrong, tested by the rules of good morals. In this case the sole offense, if any is charged, is the combination of several persons willfully and maliciously to injure the Journal Company in its business. There is no room whatever for saying that the prosecution for that offense would result in the separation of it from another and greater offense, as in the case where persons guilty of the crime of adultery were attempted to be prosecuted for a conspiracy to commit that offense. The fact that it would not be practicable or even possible in such a situation for one person alone to commit the act, *i. e.*, of injuring the business of the Journal Company, which is the alleged object of the combination, does not militate against the prosecution of all the parties to the combination as guilty of the crime of conspiring to willfully and maliciously injure the Journal Company in its business. Counsel admits that there is a dearth of authority

to support the application contended for, of the principle under discussion. He failed to cite to the attention of this court any that meet the situation when fairly analyzed, while the explanation of the rule we have given, showing that it has no application to the prosecution under discussion, is supported by ample authority, as it is by reason and common sense. We cite the following: *U. S.* v. *Stevens*, (D. C.) 44 Fed. 132; *U. S.* v. *Boyden*, 1 Low. 266, Fed. Cas. No. 14,632; *Reg.* v. *Boulton*, 12 Cox, Cr. Cas. 87; *U. S.* v. *Rindskopf*, 6 Biss. 259, Fed. Cas. No. 16,165; *U. S.* v. *Bayer*, 4 Dill. 407, Fed. Cas. No. 14,547; *State* v. *Sprague*, 4 R. I. 257; *Ochs* v. *People*, 124 Ill. 399, 426, 16 N. E. 662; *Reg.* v. *Whitchurch*, 24 L. R. Q. B. 420; *U. S.* v. *Martin*, 4 Cliff. 156, Fed. Cas. No. 15,728; *Reg.* v. *Rowlands*, 5 Cox, Cr. Cas. 466. In *Reg.* v. *Whitchurch*, a woman conspired with others to administer drugs to herself or by some other means to cause her to abort a child with which she was pregnant, and it was held that all parties concerned in the combination could be prosecuted for the offense of conspiracy. Lord Coleridge, C. J., in delivering the opinion of the court, said: "I cannot entertain the slightest doubt that if three persons combine to commit a felony they are all guilty of conspiracy, although the person on whom the offense was intended to be committed could not, if she stood alone, be guilty of the offense." In *U. S.* v. *Bayer* the facts were these: Under the statutes of the United States on the subject of bankruptcy there was an offense that could be committed only by the bankrupt. Such person and others colluded together to facilitate the commission of the offense by him. All were prosecuted for the offense of conspiracy and the prosecution was sustained. Dillon, J., in delivering the opinion of the court, said, in the main, "Conspiracy to commit a crime is of itself criminal at common law. The fact that one of the conspirators could not himself commit the intended offense neither relieves him of guilt nor disables him from co-operating with another person who is able to commit it." In that situation the conspiracy and the consummated act are different offenses, in the sense at least that the fact that the offense has been committed is no legal bar to a prosecution for the conspiracy. In *Ochs* v. *People*, *supra*, it was

said that it is not essential to a conspiracy that the object thereof be possible. We will not further discuss this question. It is not improbable that more has been already said than is warranted in its proper solution. We confess that when it was first suggested on the oral argument it hardly seemed to be worthy of serious attention or that the learned counsel so supposed. But an examination of the full discussion of the subject in counsel's brief satisfies us we were at least in error as to the state of his mind, and we have treated it accordingly and put all the labor upon it which the gravity thereof would call for if there were a reasonable doubt, before a study of the subject, as to whether the case might turn upon its solution.

We have now considered, we believe, all the important contentions and suggestions advanced by counsel for the respective parties, which from any point of view could stand in the way of an examination of the complaint and the evidence, assuming, without intending to decide, as yet, that section 4466a, Rev. St. 1898, is a valid provision of law. It has been seen that the commitment, on its face, justified the sheriff in holding the defendants in error to await their trial for a violation of such section, and that it was competent for the Circuit Court, in the *habeas corpus* suit, the proceedings before the examining magistrate having been duly presented for consideration, to go behind the commitment and determine whether the complaint, by any reasonable construction, stated an offense within the meaning of such statute, and whether there was any evidence tending to establish the two essentials for holding the accused for trial, *i. e.*, that the offense charged had been committed and that there was probable cause to believe the accused guilty thereof. Sufficient has also been said to show that the general language of the complaint, standing alone, to the effect that the accused did, on a day and at a place named—which satisfied the requisites of the statute to that extent—concert together with intent maliciously to injure the Journal Company and the other persons named, in their trade and business, sufficiently charged the doing of those acts made an offense by the statute. That such general language substantially follows section 4466a, and that such section is the only statute making a conspiracy without an overt act a criminal

offense, is not questioned. It follows that the complaint must be construed with reference to such statute, and be held to satisfy it unless the general language thereof is connected with allegations which take therefrom some essential element.

At this point we meet the claim of counsel for defendants in error that the statement of the particulars of the alleged wrongful agreement, and of the acts done pursuant thereto, explains the meaning of the general charge and in that way renders the complaint insufficient. To that, answer is made by counsel for plaintiff in error that the allegations as to acts done pursuant to the conspiracy were unnecesary, the offense being complete as soon as the agreement was made to commit the malicious injury, therefore that such allegations should be rejected as surplusage. That is undoubtedly a correct rule, but no reason is perceived why the statement of the particulars of the agreement can be rejected. It is plain that, while the complaint states generally an agreement to maliciously injure the persons named in their trade and business, in the terms of the statute, and then states that the members of the unlawful combination, pursuant to their unlawful purpose, agreed to do certain specific acts mentioned, the real purpose of the complainant was to state but one offense—not an unlawful conspiracy to injure, generally, the persons named in their business and also an unlawful conspiracy to injure them in such business in a particular way. The facts were stated first according to their legal effect and second in detail. That is the only reasonable construction of the complaint. It should be read as if the language were to the effect that the accused maliciously conspired together to maliciously injure the persons named in their business, in that they agreed and concerted together, in manner and form as stated in the statute, to maliciously injure such persons by doing the particular things alleged. That was the conclusion reached by the circuit judge. He disposed of the case at that point on a supposed insufficiency of the complaint. If he had gone further and examined the evidence the result would not have been different; for that only tended to establish the truth of the complaint. Viewed in the light of the particular allegations as to the nature of the combination the evidence, for that purpose, was ample to give

the examining magistrate jurisdiction to pass upon the truth of such allegations to the extent necessary to hold the accused to trial.

At this time it seems necessary to restate the charge contained in the complaint as we have construed it. Upon that, turn the remaining questions to be considered.

According to the complaint it was in substance agreed between the defendants in error Melvin A. Hoyt, representing the Daily News, Albert Huegin, representing the Milwaukee Sentinel, and Andrew J. Aikens, representing the Evening Wisconsin—each controlling the columns of the paper with which he was connected, each paper being a daily newspaper published in the city of Milwaukee and a medium for advertising business in the same field occupied by the Journal Company, the publisher of a newspaper called the Milwaukee Journal, also a medium for advertising business—that whereas the latter had raised its rates twenty-five per cent above those customarily charged for such service by it and the proprietors of the other papers named, if any person agreed to pay or paid the Journal Company its increased rates for advertising in its paper, he should not have the privilege of advertising in any of the other newspapers unless he should advertise in all of them at such increased rates; but that any person who should decline to pay the Journal Company said increased rates for advertising in its paper, should have the privilege of advertising in any or all of the other papers at the old rate. Now it is said there is nothing in that from which a reasonable inference of the malicious purpose called for by the statute can arise; that such intent means bad intent to injure another in the sense of committing an actionable injury, while the terms of the agreement indicate only a purpose on the part of those concerned in it to promote their own interests regardless of those of their competitor. The malice of the statute is evidently malice in law, not necessarily ill will or malice in fact. It means, as is commonly said, a wrongful act done intentionally without just cause or excuse. The statute does not deal with things corporeal, as the person or property of another, but with his reputation, trade, business or profession. If we can see in the agreement by reasonable inference, the independent purpose

to harm the Journal Company in its business of furnishing to the trade facilities for advertising, that is sufficient as regards the element of malice. There seems to be no difficulty about that. The principle that every one is presumed to intend the natural and probable consequences of his voluntary acts suggests at once, upon looking at the agreement, that the primary, if not sole, end in view was to force the Journal Company to reduce its advertising rates to the old standard or cause it to lose custom, either of which alternatives would result in pecuniary loss to it and one of them in the destruction of the freedom of action every one is entitled to enjoy in the conduct of his business, without turning any pecuniary or other legitimate gain to its competitors. If the agreement contemplated that any legitimate benefit, under any circumstances, would flow to the participants therein or the concerns they represented, by compelling the Journal Company to reduce its rates for advertising, the ground for it is not disclosed by the transaction as stated, and it is one of those mysteries of a special calling that persons outside thereof cannot comprehend. How could any material benefit have been expected by any member of the combine, from causing a customer or customers of the Journal Company to leave it rather than be denied the use of any other efficient newspaper medium for advertising in the field occupied by the four competitors? No one has seemed to seriously attempt to answer that for defendants in error. Any reason that could be suggested would be so remote and trifling as not to appeal to our reason as the purpose of forming such an elaborate and far-reaching scheme. In only one view that we can even imagine can it be said that substantial contemplated benefits to the members of the combine could have been expected, and that is this: Assuming that the reasonable necessities of business required at least two newspaper mediums for advertising in the particular field in question, the advantages of the Journal Company's paper was so great that rather than forego the use thereof, it was supposed that advertisers, in considerable numbers, would pay the severe penalty prescribed by the agreement. But that, so far as anything goes which appears in the complaint or the evidence, has little or nothing to rest upon. So, instead of looking into the agreement in vain for anything reasonably suggesting an

intent to harm the Journal Company in its business, we have great difficulty in discovering any other intent, and are not able to solve that difficulty without resorting to conjecture.

It follows that we reach the conclusion that the complaint admits of a construction which will satisfy the statute, and also that there was some proof that the defendants in error made the agreement to maliciously injure the Journal Company in its business as charged. We are next to consider whether it was such an injury as satisfies the calls of the statute. Counsel for defendants in error say it was not; that it was only an ordinary agreement between independent persons in their own business, to maintain prices at a particular level for the promotion of their legitimate interests; that such a combination is not illegal in the sense of being actionable at common law; that the statute does not change that, or, if it does, that it is unconstitutional.

We have already proceeded beyond some elements of the above somewhat compound proposition, but those parts to which we have already adverted were so exhaustively gone over by the able counsel who argued the case, both in the main argument and on the re-argument thereafter accorded for that special purpose, that we will give some further attention in this connection to what has already been referred to incidentally.

Assuming, for the moment, that the agreement is of the nature contended for, as indicated, and that the statute is aimed at such, it does not follow, in our judgment, that entering into it was not a criminal offense. That one person acting by himself or many in combination, may, in the legitimate pursuit of their own business, injure the business of a rival even to the extent of impoverishing him and driving him out of the field of industry occupied in common, leaving him remediless for his misfortune in the absence of a statute to the contrary, must be admitted. National and state legislatures have dealt with that subject in many instances, in recent years, and uniformly with success so far as regards constitutional limitations—so much that way that the man of learning must be recognized as one of courage who will attempt at this late day to challenge legislative power in that regard on constitutional grounds. The time seems past for that as regards combinations of individual independent interests, de-

signed to remain independent for most purposes, but to act in combination to control trade. By numerous decisions of the highest courts in this country, the police power incident to sovereignty has been held to be broad enough to permit the Legislature to deal, by creating civil or criminal liability, or both, with all combinations in restraint of trade which are void by common law rules on grounds of public policy, and, within reasonable limits to be set by courts in the light of constitutional safeguards, to say that things are contrary to public policy not so before, to legislate against them and to enforce the legislative will by civil or criminal liability, or both:—within the broad field indicated, to regulate or prohibit any combination of the kind we are talking about, formed for the purpose of restraining trade or disturbing those natural business conditions, where every individual is supposed to be free to contend with every other in the regular course of business. We are speaking here of independent interests concerting together for the purpose mentioned. That must be kept in mind. These questions have been so firmly settled that no court will now venture to do more than to follow what has been decided. Contracts that operate merely in restraint of trade, such as it is contended the one in question was, even though unreasonable, were not actionable at all at the common law. They were void, merely. The courts would not enforce or give effect to them. But new conditions have arisen creating new dangers, or intensifying old ones that were once considered so trifling as to pass unnoticed, calling for new restraints and new remedies. Who can say that sovereign power has been so surrendered as to be left incapable of dealing with that subject. Right or wrong, those dangers have been considered so great, and power to deal with them so ample, that legislation has gone to the length we have indicated, making combinations to stifle independent, individual competition, illegal and actionable, civilly and criminally, all upon the broad ground that legislative authority exists in the administration of the police power, to regulate or prohibit those things which are contrary to public policy by the rules of the common law; and to go further and determine, in the light of new conditions, what is detrimental to the public welfare, and to legislate accordingly.

On what has been said, the following of many authorities that might be cited are in point: *U. S.* v. *Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271, 46 L. R. A. 122; *U. S.* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Gibbs* v. *McNeeley* (C. C.), 102 Fed. 594; *Nester* v. *Brewing Co.*, 161 Pa. 473, 29 Atl. 102, 24 L. R. A. 247; *People* v. *Sheldon*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221; *Jackson* v. *Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; *People* v. *Nussbaum* (Sup.), 66 N. Y. Supp. 129; *Leonard* v. *Poole*, 114 N. Y. 371, 21 N. E. 707, 4 L. R. A. 728; *People* v. *Milk Exchange*, 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437; *Ford* v. *Association* 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298. The number of cases that could be cited on this subject is so great that no attempt has been made to do more than collect here a few that contain pretty full discussions thereof. A study of them reveals the fact that the power of public opinion in favor of preventing combinations to stifle individual freedom in business and the sacrifice of those benefits that are popularly supposed to flow from free competition, has led to legislation in most of the states of the Union, as well as by the federal congress, and that in but very few instances has such an enactment met the bar of the constitution of state or nation. A late work that treats of police powers, sums up the subject here under discussion thus: "It is believed that the constitutionality of none of the numerous anti-trust statutes has been successfully questioned on the ground that they infringed the personal liberty of contract, in punishing civilly or criminally the entrance into a contract or combination in unreasonable restraint of trade. That such contracts and agreements are void, independently of statute and at the common law—so far, at least, as to justify the courts in refusing to enforce them or in any other way to give the parties to them the aid of judicial process in protecting and enforcing the rights of parties, which grow out of such agreements—has been too long the settled rule of law, to admit of any serious question now. And the power of the state to declare such contracts unlawful being conceded, it is completely within the discretion of the Legislature to determine whether such unlawful contracts and combinations shall be simply ignored by the

courts or the parties to them be subjected to criminal or civil liabilities." 1 Tied. Cont. of Pers. & Prop., Sec. 112.

Coming back to the question of whether the malicious injury which the complaint charges against the defendants in error is such an injury as the one named in the statute, it seems that it makes little difference whether we view the statute as merely declaratory of the common law or as in the line of the numerous state statutes to which we have referred, condemning combinations to restrain, or injurious to, trade. It has the distinctive element of malice which satisfies common-law requirements of a malicious combination to injure, which is actionable for civil damages and punishable as a criminal offense by common-law rules, as we shall see later. Much confusion is created in cases of this kind by using expressions of courts made on one state of facts or as regards one form of action, to support a conclusion in a case involving a different principle. A large number of cases are cited to our attention where it is said that, if an act committed by one is not actionable, it is not where committed by many acting in concert. The fallacy of that, as applied to conspiracy in its criminal aspect where there is the distinct and substantive wrong of intent to injure, was sufficiently treated by this court in *Martens* v. *Reilly* (decided Jan. 8, 1901) 109 Wis. ——, 84 N. W. 840. Counsel for defendants in error, however, insist upon that doctrine in this case, citing many civil cases where it has some application, damages being the gist of the action, among which are three late English cases that deserve careful consideration. If the doctrine of those cases as settled in the last of them, is to prevail, we must all revise our notions of the law of conspiracy, and the books must be re-written. The following are the cases referred to: *Mogul S. S. Co.* v. *McGregor*, 23 Q. B. Div. 598, decided in House of Lords and reported in (1892) App. Cas. 25; and *Huttley* v. *Simmons*, (1898) 1 Q. B. Div. 181. The first case involved a combination to monopolize trade at the expense of plaintiff, but no element of malice was found. The action was to recover damages. In that situation it was true that the defendants were not liable in combination if one of them would not have been had he acted alone. The interesting feature of that case is absence of malice. When first

decided all the learned judges who wrote upon the question reached the conclusion on which the judgment of the court was entered, upon the theory that no specific intent on the part of the defendants to injure the plaintiff wrongfully, no malice, was disclosed by the testimony. Bowen, L. J., said: "Certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several." A combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights." Fay, L. J., said: "I lay out of consideration this case of competition used as a mere engine of malice, even where I do not in terms repeat the exception." Lord Hannen said: "I know of no restriction imposed by law on competition by one trader with another, with the sole object of benefiting himself. I consider that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one, namely, to injure plaintiffs, whether they, the defendants, should be benefited or not." The Mogul S. S. Co. Case, as appears from the opinions rendered in both courts, is full of expressions showing that it was not supposed then that an act, not actionable if prepetrated by one, could not be made so when perpetrated by several in combination, or that liberty to form business combin ations to promote the business of the members thereof in the free course of trade, applied to combinations of traders in the same calling to maliciously injure a rival. The free course of trade that one, or a number in combination, may legitimately enjoy, does not include the right to maliciously injure another in his free course of trade. Such is the decision in the Mogul S. S. Co.'s Case on its face. We should say that must have been the view of the learned men who pronounced the opinions in that case, if it were not for what followed in the subsequent case, because it is in harmony with many decisions cited and approved in the opinions, a good instance being *Gregory* v. *Brunswick*, 6 Man. & G. 205, where it was held that preconcerted hissing of an actor for the purpose of injuring him in his profession, was actionable. That and many other cases decided on the same principle were approved. If we say that

such principle had prevailed in the English courts for two centuries prior to the Mogul S. S. Co. Case, we are supported by the lord chancellor in *Allen* v. *Flood*, [1898] App. Cas. 1. There the element of conspiracy was absent, but the element of malice was present. The majority of the court there, contrary to what was said, inferentially at least, and what all of the judges were so careful to say as to indicate that it was the turning point in their minds, in the Mogul S. S. Co. Case, decided that malice in and of itself could not render that a ground for civil liability which without it would be lawful. The reasoning to support that and the decision, at least as applied to a conspiracy with malice, is out of harmony with right and justice, and out of harmony with a multitude of cases that had been theretofore decided by English courts, and the teachings of those who had built and filled the storehouses of learning from which all draw, outside of legal opinions. How can it be harmonized with *Gregory* v. *Brunswick*, where the conspirators were held liable because of their malicious purpose; and *Clifford* v. *Brandon*, 2 Camp. 358, a similar case; or *Garret* v. *Taylor*, Cro. Jac. 567, where malicious impeding of workmen was held actionable,—the authority of which, up to *Allen* v. *Flood*, had never been questioned. Those simple cases contain all the principles which govern this case, on the particular question under discussion.

The decision in *Allen* v. *Flood* was not reached by any great weight in number. Lord Watson, who delivered the main opinion in favor of it, confessed that the rule established was new in English law. The lord chancellor labored with great vigor to stem the tide of what he considered would amount to a judicial destruction of a system of law, on an important subject, which was as old as the common law. He said that the decision overruled the views of the most distinguished judges of England who had spoken on the subject for 200 years; that it was a departure from the principle that had theretofore guided the courts in the preservation of individual liberty. He cited numerous expressions of the character of those which we have quoted from the opinions of the judges in the Mogul S. S. Co.'s Case, and said that, "If the elements, which each noble lord in turn pointed out did not exist in that case, had in fact existed, the decision would

have been the other way." Lord Morris said that the decision overturned "the overwhelming judicial opinion of England." In that situation one can discover very little in the case to warrant adopting it and extending the principle thereof to a combination to maliciously injure.

After *Allen* v. *Flood*, it was but a step to reach *Huttley* v. *Simmons*, *supra*. The conclusion there was in harmony with what Lord Halsbury evidently anticipated would be the final outcome of the rule he so vigorously dissented from. The court held, combining the doctrine of the Mogul S. S. Co. Case and that of *Allen* v. *Flood*, that a conspiracy with malice, to do an act, gives a right of action only when the act agreed upon to be done and in fact done, would have been, without pre-concert, actionable as a civil injury; because an act lawful without malice is not made unlawful by the addition of the element of malice.

While it is true that the doctrine of the cases referred to, even up to the final conclusion in *Huttley* v. *Simmons*, has to some extent influenced the judicial policy of this country, it is safe to say that the teachings thereof have not, up to this time, been adopted here in any material degree. In courts where it has been partially adopted there have often been most vigorous dissents, as, for example, *Passaic Print Works* v. *Ely & Walker Dry-Goods Co.*, 44 C. C. A. 426, 105 Fed. 163. Mr. Eddy, in his work on Combinations, published the present year, after a very careful review of all of those cases, said, speaking of *Huttley* v. *Simmons*: "If this decision be sound, there is little indeed to the law of civil conspiracy. The conclusion reached is logically correct if the premises be admitted. If the proposition is sound that a conspiracy to do certain acts gives a right of action only where the acts agreed to be done, and in fact done, would have involved a civil injury to the plaintiff regardless of any confederation, then the combination is entirely immaterial, and the entire law of civil conspiracy is a superfluous discussion. * * * But, notwithstanding the decision in *Huttley* v. *Simmons*, we believe the law for England, and certainly for the United States, to be well settled to the effect that parties to a conspiracy may be liable for damages occasioned by acts which, if done by individuals severally, would not give rise to a cause of action.',

Section 503. In order to well understand that characterization, one must know that, after a review of numerous cases, the author deduced the conclusion that the element of malice, the intent to injure on the part of several acting in combination, will make that actionable that would not otherwise be so.

This court has often held that an executed conspiracy to inflict a malicious injury is actionable. To hold otherwise now and follow *Huttley* v. *Simmons*, would be to overrule those cases. *Bratt* v. *Swift*, 99 Wis. 579, 75 N. W. 411; *Association* v. *Niezerowski*, 95 Wis. 129, 70 N. W. 166, 37 L. R. A. 127; *Gatzow* v. *Buening*, 106 Wis. 1, 81 N. W. 1003. The great weight of authority, almost all authority, is to the same effect. We give a few citations. 1 Hawk. P. C. 72, § 2; *State* v. *Stewart*, 59 Vt. 273, 9 Atl. 559; *Carew* v. *Rutherford*, 106 Mass. 14; *Ertz* v. *Exchange Co.* (Minn.), 81 N. W. 737; *State* v. *Buchanan*, 5 Har. & J. 317; *Com.* v. *Waterman*, 122 Mass. 57; *Farmers' Loan & Trust Co.* v. *Northern Pac. R. Co.* (*C. C.*), 60 Fed. 803; *State* v. *Norton*, 23 N. J. Law, 33; *State* v. *Glidden*, 55 Conn. 46, 8 Atl. 890; *Sherry* v. *Perkins*, 147 Mass. 212, 17 N. E. 307; *Smith* v. *People*, 25 Ill. 17; *In re Crump*, 84 Va. 927, 6 S. E. 620; *Doremus* v. *Hennessy*, 176 Ill. 608, 52 N. E. 924.

In the last case above cited, Phillips, J., speaking for the court, summed up the subject under discussion thus: "Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable. Nor would competition of one set of men against another set, carried on for the purpose of gain, even to the extent of intending to drive from business that other set and actually accomplishing that result, be actionable unless there was actual malice. 'Malice,' as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another, it is malicious; and an act maliciously done, with the intent and purpose of injuring another, is not lawful competition." That expresses the common-law doctrine and the one that prevails here. How contrary it is to *Huttley* v. *Simmons*, appears without a suggestion.

The late English doctrine seems not to be one of those changes which come from mere development; it is a revolution. The pressure of desire for freedom to combine to monopolize trade and render combinations successful by the malicious destruction of the business of competitors is not liable to find favor with the courts in this country, especially at a time when public opinion to the contrary is so strong that much of the time of legislatures is occupied in inventing new methods of preventing combinations which are perfectly lawful by rules of the common law. The ideas pressed upon the attention of the court in this case have been pressed upon every court in the land where opportunity therefor has been presented since the decision in the Mogul S. S. Co. case. So far as then developed they were presented in *Farmers' Loan & Trust Co.* v. *Northern Pac. R. Co.*, *supra*, and rejected, the learned circuit judge who wrote the opinion quoting with approval from *Com.* v. *Carlisle*, *Brightly*, *N. P.*, 36, the following: "It will therefore be perceived that the motive for combining, or, what is the same thing, the nature of the object to be attained as a consequence of the lawful act, is, in this class of cases, the discriminating circumstance. Where the act is lawful for an individual, it can be the subject of a conspiracy when done in concert only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence."

Frequent recurrence to the fundamental principles of actionable conspiracy is essential to keep from ingrafting upon a judicial system something which is entirely new, to meet the desires of those who arrogate to themselves the right, not only to monopolize trade or effort in some particular field, but, under the guise of fair trade, to control or destroy the business of competitors without any expectation of profit to themselves—to wrongfully harm such competitors merely because they insist upon individual right to conduct individual business in one's own way. A combination with the malicious purpose indicated is an actionable wrong. Had it not been for section 4568, Rev. St. 1898, adding to the common-law essentials of an indictable

conspiracy the necessity for an overt act, section 4466a would have been unnecessary to enable the court to punish, criminally, such wrongs. That is a mere declaration of the common law. It operates as a repeal, by implication, of section 4568 so far as otherwise a specific overt act would be required to render a malicious conspiracy, to injure the trade, business, reputation or profession of another, an offense. The old doctrine, with its ancient meaning, should be referred to in construing section 4466a. An actionable conspiracy is a combination of two or more persons for the purpose of accomplishing a criminal or unlawful object by criminal or unlawful means, or a lawful object by criminal or unlawful means. One may, through purely malicious motives, attract to himself another's customers and the injury be so slight in contemplation of law that "*De minimis non curat lex*" applies; but when he unites others with him to maliciously injure the business of another for the mere gratification, in whole or in part, of a desire to inflict such injury, the condition of there being the combined force of many directed towards another, characterized by the element of malice, renders the act of combining for the particular purpose unlawful and a substantive offense, in the absence of a statute requiring some additional element. As said, in effect, in *Farmers' Loan & Trust Co.* v. *Northern Pac. R. Co.*, *supra*, the union of individual forces by agreement to accomplish the injury, gives to such agreement the character of a purpose to reach the end in view by violence, and the accomplishment thereof the character of a purpose effected by violence. The law never has and probably never will leave an individual, or class of individuals, remediless against such a wrong.

This opinion has been carried to great length. The justification therefor, if there is any, lies in the importance of the case and the numerous questions presented for decision. All of such questions, as regards the character of the wrong complained of, from the standpoint of counsel for defendants in error, have their best support in the three English cases to which we have particularly referred. A full discussion of them, as it seems, leaves little more that need be said. As indicated at the commencement, a long opinion was unavoidable if reference was to

be made even briefly to the many points presented in the voluminous briefs of counsel. As it is, there are some to which we have referred only briefly, though it is believed that all have been covered in principle. Our conclusion is this: The term "malicious injury as used in the statute, is synonymous with that term at the common law; it refers to the infliction of a wrongful injury intentionally; such a wrong is actionable even though the same purpose, if formed and executed by an individual, would not in contemplation of law, be considered sufficiently serious to call successfully for legal redress. There is nothing in this militating at all against the right of individuals to combine and associate together for the purpose of promoting their individual welfare in any legitimate way. It strikes only at the assertion of a right of combining to resort to the use, as a single power, of the individual abilities and resources of two or more to wrongfully accomplish harm to another in the line of those things mentioned in the statute. It is in harmony with the doctrine, so definitely stated by Baron Brammel in *Reg.* v. *Druitt*, 10 Cox. Cr. Cas. 593, that it has often been quoted by courts and textwriters and nowhere rejected: "The liberty of a man's mind and will to say how he shall bestow himself and his means, his talents and his industry, is as much a subject of the law's protection as that of his body;" and "if any set of men agree among themselves to coerce that liberty of mind and thought by compulsion and restraint, they are guilty of a criminal offense."

The orders of the Circuit Court discharging the defendants in error are severally reversed and the cause is remanded with directions to remand them to the sheriff of Milwaukee county.

DODGE, J., took no part.